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IN THE

Supreme Court of the United States

October Term 1965

NO. 488

MRS. ADELLE HULLUM, Administratrix, *Petitioner*

v.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, *Respondent*

PETITION FOR WRIT OF CERTIORARI
To the Court of Civil Appeals,
Twelfth Supreme Judicial District Court of Texas
Sitting at Tyler

Of Counsel:

McLENDON & TYNER
Tyler, Texas

SCHMIDT & GARRETT
1307 Sterling Building
Houston, Texas 77002

MABEL GREY HOWELL
702 Sterling Building
Houston, Texas 77002

MAX GARRETT
1307 Sterling Building
Houston, Texas 77002
Attorney for Petitioner

Alpha Law Brief Co., M & M Bldg., Houston, Texas 77002

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v.

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ON PETITION FOR WRIT OF CERTIORARI
To the Court of Civil Appeals,
Twelfth Supreme Judicial District Court of Texas
Sitting at Tyler

TO: The Honorable, The Chief Justice And The Associate Justices of The Supreme Court Of The United States:

Petitioner respectfully petitions this Honorable Court to grant the Writ of Certiorari to the Court of Civil Appeals for the Twelfth Supreme Judicial District of Texas, at Tyler, in the above cause. In this behalf, Petitioner shows unto the Court:

OPINION OF THE COURT BELOW

The opinion of the Court of Civil Appeals for the Twelfth Judicial District at Tyler was handed down November 5, 1964, and appears in 384 S.W.2d 163, styled *Mrs. Adelle Hullum, Administratrix, et al. v. St. Louis Southwestern Railway Company.* There is no opinion of the Supreme Court of Texas but it refused, no reversible error, Petitioner's Application for Writ of Error upon April 7, 1965, and overruled Petitioner's Motion for Rehearing on May 26, 1965.

The opinion is found at Appendix "A". The judgment affirming the judgment of the Trial Court, and the judgment of the Trial Court, which was a "take nothing" judgment against Mrs. Adelle Hullum, Administratrix of the Estate of J. T. Hullum, Deceased, for the benefit of herself, as the surviving wife of the decedent and their two minor children, are found at Appendixes "B" and "G" respectively. The judgment of the District Court (trial court), summarizes the answers of the Jury to the Special Issues submitted to it and is found in the record, designated at Transcript (Tr. 51-53). [The exact language of the issues submitted to the Jury, and the answers of the Jury thereto, are found in the Transcript (Tr. 40-50), and Appendix "K" herein.]

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The jurisdiction of this Honorable Court is based upon the Acts of Congress of June 25, 1958, c. 646, 62 Stat. 929, Title 28, U.S. Code, Sec. 1257(3), providing that this Court may, by Writ of Certiorari, review any final judgment of decree rendered by the highest Court of the

State in which a decision could be had, where any title, right or privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

This State court suit was brought under the FELA to recover damages for the death of J. T. Hullum for the benefit of the surviving wife and the minor children of J. T. Hullum brought by Mrs. Adelle Hullum, in her capacity of Administratrix of the Estate of J. T. Hullum, deceased, under the clause of Section 1 of the FELA, 45 U.S. Code, Sec. 51, which imposes liability on the employer for such death, "resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier . . .".

The opinion and judgment of the Court of Civil Appeals for the Twelfth Supreme Judicial District of Texas, at Tyler, sought to be reviewed herein, was rendered on November 5, 1964, set out in Appendixes "A" and "B", represents the highest State Court when the Texas Supreme Court refused, no reversible error, to entertain jurisdiction on April 7, 1965 and overruled Petitioner's Motion for Rehearing on May 26, 1965, set out in Appendixes "E" and "F", respectively.

Petitioner invokes the jurisdiction of this Court under Supreme Court Rule 19(1)(a). The State court has determined several questions of substance in this FELA case not heretofore determined by this Court, and has declared them in a way that is not in accord with applicable decisions of this Court.

The holding of the Court of Civil Appeals affirming the judgment of the Trial Court in refusing to submit

Petitioner's Specially Requested Issues and her Requested Special Instruction had the effect of depriving Petitioner of her federally created rights under the FELA[1], by denying a trial by jury of the requested issues and a proper instruction of the law to the jury.

The Court of Civil Appeals erred in holding, in effect, there was evidence raising the issue of Respondent's affirmative defense of "unavoidable accident" which cast upon Petitioner the burden of proving "the event was not the result of unavoidable accident".[2] Petitioner was deprived of substantial rights created under the FELA by the prejudicial admission in evidence of the self-serving declaration of Respondent's agent and representative, Engine Foreman W. B. Bradley, and by showing to the jury a "staged" motion picture experiment, made under the direction of the Engine Foreman W. B. Bradley, of a so-called "kicking" movement in Respondent's switching yards that did not purport to show the conditions existing at the time Petitioner's decedent had a box car "kicked" out from underneath him while he was standing on top of it, preparing to set the brake had he not been thrown off the top of the box car.

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[1] Cf. Holding of this Court concerning Special Issue practice in Texas in **Arnold v. Panhandle & Santa Fe Railway Co.**, 353 U.S. 360, 77 S.Ct. 840, 1 L.Ed. 2d 889 (1957); **McAllister v. Magnolia Petroleum Co.**, 357 U.S. 221, 78 S.Ct. 1201 (1958).

[2] **Rosenthal Drygoods Co. v. Hillebrandt**, Tex.Com.App., 7 S.W. 2d 521; **Hicks v. Brown** (1941), 136 Tex. 366, 151 S.W. 2d 790, 793. Cf. **Blanton v. E. & L. Transport Co.** (1948), 146 Tex. 377, 207 S.W. 2d 368 (1948), where it was held if a jury finds negligence on the part of a defendant and also finds the event was "an unavoidable accident," there is irreconcilable conflict with a jury's finding of primary negligence requiring a mistrial.

The jurisdiction of this Court is sought to remedy an unjust verdict that has the effect of depriving Petitioner of a fair trial to enforce her Federally created rights under the provisions of the FELA.

QUESTIONS PRESENTED

I. To accord Petitioner a fair trial, did the lower courts deprive Petitioner of her federally created rights under the FELA by local practice and procedure by the holding of the Court of Civil Appeals, the trial court properly refused to submit to the Jury Petitioner's Requested Issue No. 1-A and 2-A, inquiring as to the negligence and proximate cause as to the "kicking of cars on the occasion in question on a down-grade"?

II. To accord Petitioner a fair trial, did the lower courts deprive Petitioner of her federally created rights under the FELA by local practice and procedure by the Court of Civil Appeals holding the trial court properly refused to submit to the Jury Petitioner's Requested Special Issues Nos. 3-A, 4-A and 5-A inquiring as to the fact of, Respondent's negligence and proximate cause as to the defendant's crew kicking cars in question "without first determining that J. T. Hullum was in a safe position aboard the car he was riding"?

III. To accord Petitioner of a fair trial did the lower courts deprive Petitioner of her federally created rights under the FELA by local practice and procedure by the Court of Civil Appeals holding the

trial court properly refused to submit to the Jury Petitioner's Specially Requested Instruction No. 2 reading:

> **"You are further instructed that the Defendant Railroad is under a continuing non-delegable duty to provide its employees, including the Plaintiff's decedent, J. T. Hullum, with a reasonable safe place within which to work."[3]**

IV. To accord Petitioner a fair trial, the Court of Civil Appeals erred in affirming the judgment of the trial court thus holding, in effect, there was evidence raising the issue of "unavoidable accident" when in fact there was no competent evidence raising the issue, and upheld the Jury finding the event "was the result of an unavoidable accident". The answer of the Jury to the effect the event "was the result of an unavoidable accident," was a finding against the overwhelming preponderance of the evidence so as to be manifestly wrong and unjust because such judicial appraisal of the evidence deprived Petitioner of her federally created rights under the FELA.

V. Petitioner was not accorded a fair trial where, over the timely objection of Petitioner, prejudicial

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[3] Such instruction was sought as an additional instruction for the Jury to consider for its answer to Special Issue No. 9 (inquiring whether "defendant failed to provide J. T. Hullum, deceased, with a reasonably safe place in which to work"') along with the following instruction the trial court gave to the Jury:

"You are instructed by the term 'reasonably safe place in which to work' as used herein, is meant such a place with regard to the safety of its employees as would be furnished by an ordinary prudent employer in the exercise of ordinary care under the same or similar circumstances." (Appendix "K").

evidence was adduced by Respondent in the presence of the Jury, as follows:

(a) Respondent's agent and vice-principal W. B. Bradley, Engine Foreman of the switching movement, testified concerning a conversation with Petitioner's decedent to the effect he did not blame anyone for his injury because such testimony was clearly inadmissible as a self-serving statement, hearsay and a conclusion on the part of the alleged declarant, related by an interested witness (absolving himself from negligence acting on the occasion in question as the representative of Respondent).

(b) Respondent's agent and vice principal W. B. Bradley, Engine Foreman of the switching movement that resulted in the death of J. T. Hullum, Petitioner's decedent, supervised a "staged" motion picture experiment of a "kicking" operation in the Tyler switching yards that did not purport to substantially show the conditions that actually existed in the "kicking" operation that resulted in the death of J. T. Hullum, on December 13, 1961 and some of the members of the switching crew were not present at the time the "staged" motion picture experiment was made and the same engine or style of boxcars were not used in such motion picture experiment.

The Court of Civil Appeals erred in holding such evidence set forth in (a) and (b) competent, when, in fact, such evidence was incompetent and highly prejudicial to Petitioner in pursuit of her federally created rights under the FELA.

VI. Is the Petitioner precluded in this FELA case from securing a new trial because it calls upon this Court or an Appellate Court to examine the whole record to determine whether the facts support the judgment rendered adversely to Petitioner, based on the Jury's Findings to Special Issues Nos. 1, 3, 5, 7, 9 and 20 that exonerates Respondent of negligence, under the holding of this Court in *Deen v. Hickman*, 358 U.S. 57, 79 S.Ct. 1, 3 L.Ed. 2d 28? If so, how may such a Petitioner under the FELA secure relief where she has been deprived of her federally created rights under the FELA because there has been no proper judicial review of the evidence according to the correct principles of law by an Appellate Court?

STATUTES INVOLVED

The Statute involved is Section 51, Title 45 U.S. Code, known as the Federal Employers' Liability Act. (Appendix "I").

STATEMENT

This suit was instituted by Mrs. Adelle Hullum in her capacity as Temporary Administratrix of the Estate of J. T. Hullum, deceased, to recover damages growing out of the injury to and the subsequent death of J. T. Hullum for the use and benefit of herself, as the surviving wife and their minor children, Richard Sidney Hullum and Cynthia Ann Hullum, pursuant to the provisions of 45 U.S. Code, Sec. 51, et seq., commonly known as the FELA against decedent's employer, St. Louis Southwestern Railway Company, a corporation. Prior to the time of trial, the temporary administration was made permanent. [The

mother of the decedent, Mrs. Ivie Hullum was one of the plaintiffs included in the suit brought by Mrs. Adelle Hullum in her capacity as Administratrix of the Estate of J. T. Hullum, deceased, but the mother, Ivie Hullum, was dismissed by Order of Court without prejudice. (Tr. 13-14).] Petitioner went to trial on her Second Amended Petition wherein it was alleged that decedent and his employee were engaged in activities closely and directly related to the carrying on of Interstate Commerce. That on December 13, 1961, decedent was working as a switchman on a switching operation for the Respondent Railway Company, when he received severe personal injuries that caused his death on January 8, 1962, at the age of 41 years. The acts of negligence alleged against Respondent were:

(1) Failing to furnish decedent with a reasonably safe place in which to work;

(2) In failing to keep a proper lookout for decedent on the occasion in question;

(3) In moving the cars at a speed in excess of that at which an ordinary person in the exercise of ordinary care would have moved the cars under the same or similar circumstances;

(4) In kicking the cars in question on the occasion in question rather than in shoving them;

(5) In kicking the cars in question on the occasion in question harder than a person of ordinary prudence would have kicked the same under the same or similar circumstances;

(6) In kicking the cars in question on the occasion in question without first determining that the decedent was in a safe position aboard the car he was riding;

(7) In kicking the cars in question on a downgrade

All of such acts constituted negligence on Respondent's part, or on the part of his agent, servants and employees other than the decedent, and each was separately and concurrently a proximate cause of the injuries and resulting death of decedent.

By reason of the injuries sustained by J. T. Hullum on December 13, 1961, he was entitled to damages for his conscious pain and suffering until the time of his death on January 8, 1962. Damages were sought for his conscious pain and suffering, as well as for damages sustained by the surviving wife and his minor children, the statutory beneficiaries under the FELA, by the Petitioner, in her capacity of Administratrix of the Estate of J. T. Hullum, to be apportioned by the Jury. (Tr. 8-12).

Respondent went to trial on its Third Amended Original Answer consisting of a general denial, as well as affirmative defense of contributory negligence on the part of the decedent, and the defense of contributory negligence on the part of the decedent, and the affirmative defense that the death of J. T. Hullum was the result of an unavoidable accident (Tr. 4-7).

The trial began October 7, 1963 in the State district court at Tyler, Texas.

The job on which Hullum was working at the time of his injuries was a switching assignment which began work at 7:59 A.M. on December 13, 1961 (S.F. 40). The

injuries occurred at 11:55 o'clock A.M. (S.F. 41). Just before their occurrence, cars were being switched out of Track No. 6 in the Respondent's Yards at Tyler, Texas. One car was kicked unmanned to Track No. 11; one car was kicked unmanned to Track No. 8 (S.F. 42); one car was kicked to Track No. 6, which car Switchman C. R. Strother rode to apply a brake (S.F. 43); then six cars were kicked to Track No. 9 which cars Petitioner's decedent, J. T. Hullum was to ride to set a brake (S.F. 44-45). Mr. Hullum mounted the first of the six-car cut, and was standing on top of the car about three or four steps back from the end of the car, facing the engine (S.F. 45-46). The cars were not stopped, but were kicked ahead and out from under Mr. Hullum. He fell down between the cars (S.F. 48). Switchman Strother saw this happen, and he is the *only eye witness to the event.* He jumped off of his car (on Track No. 6) ran over to Track No. 9, went up one of the cars and stopped it. He found Hullum underneath the edge of the car he fell from. (S.F. 48). Hullum was bleeding from the shoulder and had been dragged 55 or 60 feet (S.F. 50). He was taken away by ambulance (S.F. 52).

The speed of the cars that Petitioner's decedent was riding was estimated at 5 or 6 miles per hour (S.F. 51), and before the kick was made, at 3 or 4 miles per hour (S.F. 134), with the engine traveling up to 7 or 8 miles per hour (S.F. 141). The cars were on a descending grade with a curve in the track (S.F. 128). When the cars are going downgrade there is no need to kick them (S.F. 57). They go down by their own momentum when separated (S.F. 58). It is not necessary to kick cars in order to stop them, they can *be shoved* to a spot (S.F. 58-59).

The impact on a man riding the car that is being shoved to a stop isn't near as hard as kicking the car loose (S.F. 382). It is the duty of the engine foreman to know that his men are in a safe place before kick movements are made. (S.F. 59, 389). *The usual practice in the Tyler Yard is to stop the movement, kick the cars ahead, then kick another car and stop, etc. This method was not done on the occasion* (S.F. 61). The Engine Foreman W. B. Bradley, who gave the kicking signal could not see Petitioner's decedent on top of the car from his position on the ground on the engineer's side, near the switch (S.F. 384-385) even if he had looked for Hullum (S.F. 388). He did not know where Petitioner's decedent was (S.F. 390-391). But nevertheless, he gave the signal for the cars to be kicked (S.F. 391). The weather was cold on December 13, 1961, so the engine foreman knew the cars had to be kicked harder than normal (S.F. 391), and that this causes an impact to one on top of the cars and knew that slack will whip up at the end of the cars. There was no need to rush the movement, nevertheless, the engine foreman gave the signal for the cars to be kicked anyway (S.F. 392).

Petitioner requested instructions be included in the Trial Court's Charge as to the (Respondent) railroad's continuing non-delegable duty to provide employees with a reasonably safe place in which to work (Tr. 29). The instruction was refused (App. "L").

Petitioner also requested Special Issues 1-A through 5-A to be included among the Special Issues submitted to the Jury as to negligence and proximate cause in kicking the cars on a downgrade, and in kicking the cars without first determining that Petitioner's decedent was in a safe position

on the car he was riding (Tr. 30-35). These Requested Issues were refused (App. "M").

Based on the Special Issues submitted by the Trial Court to the jury the jury awarded Petitioner's total damages in the amount of $92,500.00, duly apportioned but the jury found Respondent was not negligent in: (1) keeping a proper lookout for J. T. Hullum; (3) the switching crew did not move the cars they were switching at an excessive speed; (5) the kicking of the cars on the occasion was not negligent; (7) the cars in question were not kicked harder than they would have been kicked by an ordinary prudent person; (9) defendant did not fail to provide J. T. Hullum with a reasonably safe place in which to work; (11) the death of J. T. Hullum was not due solely to natural causes; (12) the injuries sustained by J. T. Hullum on December 13, 1961 were the cause of his death on January 8, 1962; (13) J. T. Hullum did not fail to keep a proper lookout for his own safety; (15) J. T. Hullum did not assume an unsteady position on top of the box car in question; (18) J.T. Hullum did not fail to brace himself upon the box car at the time the cut of six cars were uncoupled from the remaining cars as an ordinary prudent person would have done under the same or similar circumstances; (20) *the occurrence in question was the result of an unavoidable accident.* (Tr. 37-50; App. "K")

Judgment was entered in favor of Respondent on October 16, 1963 (Tr. 51-53; App. "G"). Such "take nothing" judgment was entered on a verdict that absolved Petitioner's decedent and Respondent of negligence, and the event "was the result of an unavoidable accident". (Tr. 51-53; Appendix "G"). An appeal was duly perfected. The Court of Civil Appeals holds, in effect, the trial court

did not commit reversible error by: (a) refusing to give Petitioner's Specially Requested Special Issues Nos. 1-A to 5-A, inclusive, for the Jury to consider; (b) refusing to give Petitioner's Special Requested Instruction for the Jury to consider in addition to the instruction given by the Court to Special Issue No. 9 (safe place to work issue); (c) admitting into evidence, over timely objection by Petitioner, a statement attributed to J. T. Hullum, while he was in the Mother Frances Hospital at Tyler, Texas, as testified to by Respondent's Engine Foreman, Bradley, on the theory same was an "admission" against interest; (d) Admitting into evidence a "staged" motion picture experiment of a "kicking" operation in the Tyler Yards, produced under the direction of Respondent's Engine Foreman Bradley, with only some of the members of the switching crew present or participating in same, and did not purport to substantially depict the operation involved at the time J. T. Hullum was injured; (e) there was evidence supporting the finding of the Jury that the occurrence was the "result of unavoidable accident" and the answer was not contrary to overwhelming preponderance of the evidence as to be manifestly wrong and unjust, as well as the answers of the jury to Special Issues Nos. 1, 3, 5, 7 and 9 were not contrary to the evidence (inquiring about acts of negligence on the part of Respondent).

Despite the fact that Mr. C. R. Strother, a member of the switching crew, was an eye witness to the event which caused serious bodily injuries to J. T. Hullum that produced his death, the Court of Civil Appeals seemingly gives controlling effect to an history purportedly related by Mr. Hullum upon his arrival at St. Louis Southwestern Railway Lines Hospital at Texarkana on December 22, 1961, as follows:

"Present Illness: The patient gives a history of injuries on December 13, 1961, in the Tyler Yards. He was on top of a car (moving) trying to get from that car to the next. Then lost his balance. Fell between the 2 cars on the ground and apparently he was dragged for some distance before the cars came to a stop. Multiple injuries resulted."

The Mother Frances Hospital records show on admission to that hospital on December 13, 1961 a history of a "fall" and "caught between two boxcars". (Pft's Exh. #2). Arrangements were made for his transportation via ambulance to the Cotton Belt Hospital on December 22, 1961 if he was able. The distance between Tyler and Texarkana is approximately 144 miles. On December 21, 1961, Mr. Hullum was taken to surgery at the Mother Frances Hospital to apply a shoulder spica cast. The Physician's Order sheet shows morphine was ordered for the trip on December 22, 1961, and he was so injected at 10:30 o'clock a.m., which was in addition to other sedatives that had been given to him earlier that morning. He was carried from that hospital at 10:45 o'clock a.m. via ambulance and arrived at the Cotton Belt Hospital at 1:50 o'clock p.m. The treating physicians at the Cotton Belt Hospital were Dr. Wm. Hibbitts under who Dr. Eugene Franceschi, a non-licensed Texas physician, but a recognized surgeon abroad where he had practiced in Italy. Dr. Hibbitts received medical reports from Dr. Milton Freiberg, surgeon in charge of the case, and Dr. C. R. Hurst, who had treated Mr. Hullum in Tyler. Dr. Dimitri Boosalis was the admitting doctor at the time Mr. Hullum arrived at the St. Louis Southwestern Railway Lines Hospital (Cotton Belt), but he never treated or gave orders concerning his treatment there or made specific calls to see Mr. Hullum while he was there. He happened to be on duty at the time

he was admitted and on call when he was called about 4:00 o'clock a.m. on January 8, 1962, just prior to the death of Mr. Hullum. Immediately after Mr. Hullum arrived there, he was given sedatives. (Pts's Exh. #1; portions read to jury, S.F. 303-310). Such history given to the hospital at Texarkana is hearsay[4], has no probative force[5]; declarant is not alive to contradict same[6], and it does not overcome the presumption decedent was not negligent.[7].

HOW THE FEDERAL QUESTIONS WERE RAISED

Petitioner brought suit against her decedent's employer, Respondent herein, to recover damages for the severe bodily injuries sustained by her decedent on December 13, 1961, and produced his death on January 8, 1962 by reason of the negligence of Respondent for the benefit of the statutory beneficiaries, which cause of action arose, under and is governed, by the FELA, 45 U.S. Code, Sec. 51, et seq., as amended by the Act of August 11, 1939.

Petitioner timely requested the trial court to submit her Special Issues Nos. 1-A through 5-A inclusive, as well as, timely requested her Special Requested Instruction be given to the Jury in connection with Special Issue No. 9, which the trial court refused to give to the Jury. Thereafter,

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[4] **Skillern & Sons, Inc. v. Rosen,** Tex.Sup.Ct., 359 S.W.2d 298, construing Art. 3737e, Subd. 1(d), Vernon's Ann. Civ. St.

[5] **Henry v. Phillips,** 105 Tex. 459, 151 S.W. 533, 538; **American General Insurance Co. v. Jones,** 152 Tex. 99, 255 S.W. 2d 502; **Aetna Insurance Co. v. Klein,** 160 Tex. 61, 325 S.W. 2d 376, 381.

[6] **American General Insurance Co. v. Jones,** 152 Tex. 99, 255 S.W. 2d 502.

[7] **Tennant v. Peoria & P. U. Ry. Co.,** 321 U.S. 29, 64 S.Ct. 409, 88 L.Ed. 520; **Boaz v. White's Auto Stores,** 141 Tex. 366, 172 S.W. 2d 481.

Assignments of Error Nos. XII through XVI and Assignment of Error No. XI in Petitioner's Amended Motion for New Trial were overruled by the trial court and Points No. One through Three, inclusive, in the Brief for Appellant in the Court of Civil Appeals were germane to these Assignments of Error. The Points were *overruled* by the Court of Civil Appeals. The substance of the Specially Requested Issues were: Whether the kicking of the cars on the occasion in question on a down grade was negligence, and predicated upon an affirmative answer to that Issue; whether such negligence, if any, was a proximate cause in whole or in part of injuries received by J. T. Hullum (Requested Special Issue No. 1-A and 2-A, Appendix "M"); whether Defendant's crew kicked the cars in question without first determining that J. T. Hullum was in a safe position aboard the car he was riding, and predicated upon an affirmative finding to that Issue, whether such action was negligent and a proximate cause, in whole or in part, of the injuries received by J. T. Hullum. (Requested Special Issues Nos. 3-A, 4-A and 5-A, Appendix "M"). The Special Requested Instruction sought was an instruction to the effect that the Defendant Railroad was under a continuing non-delegable duty to provide its employees, including the Plaintiff's decedent, J. T. Hullum, with a reasonable safe place in which to work in conjunction with Special Issue No. 9 inquiring whether Defendant failed to furnish or provide J. T. Hullum, deceased, with a reasonably safe place in which to work. Further objection was made in the trial court to the submission of Special Issue No. 20, inquiring whether the event was not the result of an unavoidable accident on the ground it was a double submission and placed upon Petitioner a double burden to not only prove by preponderance of the evidence

that Defendant was negligent in some respect, but also the further burden of proof by preponderance of the evidence that the event was not the result of an unavoidable accident. (Appendix "N"; Tr. 17-22). On appeal, as well as in the trial court, by proper Assignments of Error, Petitioner contended the answers of the Jury to Special Issues No. 1, 3, 5, 7, 9 and 20, being the primary negligence Issues on the part of Respondent and the Issue submitting unavoidable accident were contrary to the great weight and overwhelming preponderance of the evidence as to be manifestly wrong and unjust.

The trial court submitted to the Jury an Issue inquiring whether the occurrence "was not the result of an unavoidable accident," which, under the Texas practice, is called an "inferential-rebuttal" Issue, meaning it is an affirmative defense in rebuttal of Petitioner's theory of the cause that his decedent's injuries were proximately caused by an act of negligence on the part of Respondent and the burden was upon Petitioner to secure a finding that the occurrence "was not the result of an unavoidable accident." Under Texas practice Issue, it must be given if the evidence raises the Issue to justify the submission.[8] The Texas Supreme Court holds the Texas Rules of Civil Procedure control the form of submission of Issues to the Jury[9] in an FELA case. This "inferential rebuttal" issue of "unavoid-

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[8] **Dallas Railway & Terminal Co. v. Bailey,** 151 Tex. 359, 250 S.W. 2d 379, 383, 385.

[9] **Thompson v. Robbins,** 157 Tex. 463, 304 S.W. 2d 111, 116 (FELA case). Cf. **Central Vermont R. Co. v. White** (1914), 238 U.S. 507, 35 S.Ct. 865, 59 L.Ed. 1433, where it was held the railroad company had the burden to prove **contributory** negligence even in those states where "as a condition of his right to recover must also show he was not guilty of contributory negligence", for the reason Congress intended for the Federal rule to apply in an FELA case.

able accident" is considered an *evidentuary issue* in the sense it alone cannot support a judgment; and a negative answer of negligence, an element of Petitioner's ground of recovery, is also necessary. If, however, the Jury found Defendant guilty of negligence and also found the event was the result of an unavoidable accident, there would be irreconcilable conflict in the findings so as to require a declaration of mistrial, if there was evidence to support the findings of "unavoidable accident."[10]

The trial court committed prejudicial error in the admission of evidence, over timely objection of Petitioner, which was calculated and probably did cause the rendition of an improper verdict and judgment in this cause.

Basically, the Assignments of Error presented to the State courts are to the effect Petitioner has been deprived of her Federally created rights and her substantive rights by local procedure and practice[11] in that the jury was improperly influenced by prejudicial evidence adduced that affected the verdict; the jury was improperly instructed, and Petitioner had no right of trial by jury of her Requested Issues, and the verdict is unjust.

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[10] **Bradford v. Arheleger,** 161 Tex. 425, 340 S.W. 2d 772; **Blanton v. E & L Transport Co.,** 146 Tex. 377, 207 S.W. 2d 368.

[11] Cf. **Texas & Pacific Ry. Co. v. Van Zandt,** 159 Tex. 178, 317 S.W. 2d 528, 531 (passenger injury action), reversed, under Rules 434 and 503, T.R.C.P., because railway company's requested Special Issue was not submitted to the Jury. There the Court construed Rules 434 and 503 by saying "[the Rules] do not contemplate that a party be denied the Constitutional right of trial by jury." And, construed the same Rules for reversal of judgments because of admission into evidence of "habit" where "there was an eye-witness", in **Missouri-Kansas Texas R.R. Co. v. McFerrin,** 156 Tex. 69, 291 S.W.2d 931, and of a motion picture experiment in **Fort Worth & Denver Ry. Co. v. Williams,** Tex.Sup.Ct., 375 S.W. 2d 279 [Last two cases, railroad crossing collisions.]

ARGUMENT

I. To accord Petitioner a fair trial, did the lower courts deprive Petitioner of her federally created rights under the FELA by local practice and procedure by the holding of the Court of Civil Appeals, the trial court properly refused to submit to the Jury Petitioner's Requested Issue No. 1-A and 2-A, inquiring as to the negligence and proximate cause as to the "kicking of cars on the occasion in question on a down-grade"?

II. To accord Petitioner a fair trial, did the lower courts deprive Petitioner of her federally created rights under the FELA by local practice and procedure by the Court of Civil Appeals holding the trial court properly refused to submit to the Jury Petitioner's Requested Special Issues Nos. 3-A, 4-A and 5-A inquiring as to the fact of, Respondent's negligence and proximate cause as to the defendant's crew kicking cars in question "without first determining that J. T. Hullum was in a safe position aboard the car he was riding"?

Omitting the formal part of Petitioner's Specially Requested Issues Nos. 1-A through 5-A, inclusive, wherein each Issue began with the phrase "Do you find from a preponderance of the evidence", each issue submitted questions, were, as follows:

1-A Kicking of the cars on the occasion in question on a down-grade was negligence? [And predicated upon an answer of "we do" to Special Issue No. 1-A, Special Issue No. 2-A that such negligence, if any,

was a proximate cause in whole or in part of the injuries received by J. T. Hullum on the occasion in question?]

3-A Whether Defendant's crew on the occasion in question kicked the cars in question without first determining that J. T. Hullum was in a safe position aboard the car he was riding? [And predicated thereon were the subsidiary corrolary Issues No. 4-A inquiring whether such action was negligence and 5-A whether such negligence was a proximate cause, in whole or in part, of the injuries received by J. T. Hullum on the occasion in question? *The exact form of the Specially Requested Issues are found at Appendix "M".*]

Petitioner cannot be accorded a fair jury trial where her Specially Requested Issues, as set out above, were refused by the trial court so the jury never had an opportunity to consider them. This is the question presented to this Honorable Court. It is respectfully submitted the refusal of them had the effect to deprive Petitioner of her federally created rights under the FELA. In *Bailey v. Central Vermont R. Co.* (1943), 319 U.S. 350, 87 L.Ed. 1444, 63 S.Ct. 1062, this Honorable Court recognized that to deprive the plaintiff of the benefit of a jury trial was to take away a goodly portion of the relief which the FELA afforded. While Petitioner sought relief from the Texas Supreme Court, in regard to the erroneous holdings of the Court of Civil Appeals in respect to the Specially Requested Issues set out above, such Court did not take jurisdiction. However, in *Texas & Pacific Railway Company v. Van Zandt*, 159 Tex. 178, 317 S.W.2d 528, the cause was reversed and remanded because the trial court refused to submit the railway company specially re-

quested issue inquiring whether Respondent sustained personal injuries on the occasion in question. It was there said in response to a contention the failure to give such requested issue was harmless error:

> "The Rules of Civil Procedure must be applied to plaintiffs and defendants alike. To apply Rules 434 and 503 in the manner suggested by respondent would deny to a party the right of trial by jury guaranteed by Section 15 of Article I of our Constitution Vernon's Ann. St. * * * *
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> "Rules 434 and 503 do not contemplate that a party may be denied the constitutional right of trial by jury. The mere denial of that right raises an inference of probable harm. Texas Emp. Ins. Ass'n v. McCaslin, Tex.Sup., 317 S.W.2d 916."

Rules 277 and 279, Texas Rules of Civil Procedure govern the submission of Special Issues in the State court (Appendixes "P" and "Q"). In *Whitfill v. Hunt*, (Tex.Sup. Ct. 1965), 387 S.W.2d 653, it is said:

> "Rule 277, Texas Rules of Civil Procedure, entitles the parties to submission of all ultimate issues."

and continuing, said:

> "The right of the defendant to have affirmative defenses submitted must not be determined from the viewpoint of conditions as they appear after the verdict is returned, but from the viewpoint of what the jury might have found from the evidence if the issue had been submitted to them."

The judgments of the lower courts were reversed and the cause remanded for a new trial because of the failure to

submit an issue inquiring of the failure of plaintiff to sound his horn and his failure to apply his brakes as negligence and a proximate cause of the automobile accident.

Then, in *Barclay v. C. C. Pitts Sand and Gravel Company*, (Tex.Sup.Ct. 1965), 387 S.W.2d 644, the cause was reversed because of the form of the special issue. There it was said:

> "When a case is submitted on special issues, the court is required to give 'the *controlling issues made by the written pleadings and the evidence.*' Rule 279, Texas Rules of Civil Procedure. As pointed out in the article cited above, this Rule has been given one meaning in negligence actions and a somewhat different meaning in other types of cases. Reasonably broad issues, embracing several distinct and essential elements of a cause of action or defense have been upheld in a number of non-negligence suits. Even in negligence cases there are a few more or less general inquiries which may be submitted without fragmentation into their factual components. Examples are proper lookout, Texas & Pacific Ry. Co. v. Snider, 159 Tex. 380, 321 S.W.2d 280; Traywick v. Goodrich, Tex.Sup., 364 S.W.2d 190; attractive nuisance, Eaton v. R. B. George Investments, Inc., 152 Tex. 523, 260 S.W.2d 587; and discovered peril, Turner v. Tex. Co., 138 Tex. 380, 159 S.W.2d 112. *It is nevertheless well settled that as a general rule and when the question is properly raised, special issues relating to either primary or contributory negligence should be restricted to specific acts and omissions which have been raised by the pleadings and evidence.* Fox v. Dallas Co., 111 Tex. 461, 240 S.W. 517; Roosth & Genecov Production Co. v. White, 152 Tex. 619, 262 S.W.2d 99; Kainer v. Walker, Tex.Sup. 377 S.W.2d 613. (Emphasis supplied).

Many Texas cases have been reversed by the State courts because of the trial court's failure to submit a party's special requested issue. Most often, the reversal results from the failure to submit a defendant's specially requested issue. A few of them are noted in the footnote below.[12]

This Honorable Court has had occasion to speak about Special Issues in a FELA case in *Arnold v. Panhandle & Santa Fe Railway Company*, 353 U.S. 360, 77 S.Ct. 840. There the proofs justified the jury's conclusion that employer negligence played a part in producing the injury and in the Per Curiam Opinion, it was said:

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[12] **Texas & N.O.Ry.Co. v. Day,** 159 Tex. 101, 316 S.W. 2d 402, 408 (failing to give defendant's requested issue of failure to stop at crossing in accordance with statute); **San Antonio Portland Cement Co. v. Chandler** 360 S.W. 2d 165 (failure to submit contributory negligence of failure to notify crane operator where plaintiff would be working); **Maryland Casualty Co. v. Brown,** 131 Tex. 404, 115 S.W. 2d 394 (failing to submit inquiry that plaintiff secured permission to solicit prospects in Republic of Mexico); **Walgreen-Texas Co. v. Shivers,** 137 Tex. 493, 154 S.W. 2d 625 (failure to submit issue of whether Mrs. Shivers attempted to back off seat at soda fountain); **Agnew v. Coleman County Electric Coop., Inc.,** 153 Tex. 587, 272 S.W. 2d 877 (contributory negligence issue submitted generally, but reversed because it failed to give specific issue that plaintiff failed to sound horn); **Southwestern Greyhound Lines, Inc., v. Dickson,** 219 S.W. 2d 592 (failure to keep proper lookout submitted to jury, but nevertheless reversible error to fail to submit issue of whether plaintiff raised foot sufficiently to clear hose as requested by defendant, on the ground it was not "various phases or different shades" of the lookout issue") **Holmes v. J. C. Penney Co., Inc., Tex.S.Ct.,** 382 S.W. 2d 472, harmless error, to submit (1) defendant failed to provide a safe place for the plaintiff to walk; (2) did defendant maintain the step with a loose metal strip thereon, (3) did defendant fail to exercise ordinary care in installing the metal strip. There are many other cases that could be cited where a case has been reversed because of failure to submit a specially requested issue was reversible error requiring a new trial.

"* * * The jury's general verdict, that the respondent negligently contributed to the petitioner's injury, has support in the testimony of witnesses justifying the inference that the passageway as used was not a safe place for the petitioner to work while performing his assigned duties. The special issues claimed to be in conflict with this finding concerned alleged negligence only in the operation and presence of the truck on this passageway. But even if the rule announced by the Court of Civil Appeals controlled, as we see it these answers present no square conflict. The findings on these special issues do not exhaust all of the possible grounds on which the prior unsafe-place-to-work finding of the jury may have been based. Hence all of the findings in the case might well be true insofar as the record indicates. The petitioner having asserted federal rights governed by federal law, it is our duty under the Act to make certain that they are fully protected, as the Congress intended them to be. We therefore cannot accept interpretations that nullify their effectiveness for * * * the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice."

Then, in *McAllister v. Magnolia Petroleum Company*, 357 U.S. 221, 78 S.Ct. 1201, an action by a seaman for injuries on the ground of unseaworthiness and negligence under the Jones Act, it was pointed out that charges set out in the margin were erroneous. The judgment of the Texas Court of Civil Appeals was vacated, and the cause remanded to proceed in a manner not inconsistent with the opinion of this court.

Coming, now to the testimony that supports Petitioner's right for her Specially Requested Special Issues be submitted to the jury, *C. R. Strother*, a member of the switch-

ing crew, testified: that a forward motion is necessary in order to separate the cars when the slack is stretched; that if engine is behind the cars, shoving them down a hill, the speed of the engine is increased, if engine is not going as fast as the cars to take up the slack by pushing the cars together; that when a cut of cars is being shoved ahead by the engine, the slack is bunched so that the pin can be pulled at any time so that it was not necessary to kick the cars going down the hill if the engine is in a forward motion and there is no necessity to kick them when the engine is going as fast as the cars or a little bit faster than the cars; when the cars are separated [from the engine] *they go on down by their own momentum.* The cars can be *shoved* to the spot and the engine can be backed out, but such method was not followed in the Tyler Yards even though it was a safer movement because the "kicking" operations saved time rather than the safety of the movement that controlled whether a car was "kicked" or whether shoved to a spot. (S.F. 57, 58, 59). It was the duty of the Engine Foreman in charge to know where all of his men are at all times while the (switching) movements were being made and for the Engine Foreman to know that his men are in a safe place before kick movements were made. He (witness) had acted as Engine Foreman on occasions while working for Respondent and he had been instructed by the Railroad in safety meetings from time to time to always be sure to know where everybody was before any (switching) moves were made so that everybody was in a safe place. (S.F. 59, 68, 69).

G. H. BIVINS, the Engineer of the switch engine, testified: in his experience, the *engine foreman was supposed to know where his men were at all times so that the*

work could be done with safety (S.F. 140) before a kick movement was made and a man is to set the brake on the cars to be kicked loose from the rest of the train, it was the duty of the Engine Foreman to know that the man who was going to set the brake is in a position of safety and able to set that brake (S.F. 142).

W. B. BRADLEY, Engine Foreman and the person who gave signals to the Locomotive Engineer, testified: He was aware that track #9 was a *fast track;* it was down hill so that cars would go faster and there was *no need to kick* a car because it was down-grade at the track; the grade of the track was such that the only kick necessary was to pull the pin and the car would roll by itself (S.F. 190, 191, 192); that the reason that the *cars were kicked rather than shoved was to speed up the operation* of the Railroad; but there were instructions from the Railroad in regard to certain commodities which were to be handled by shoving the cars rather than kicking; the *safety of the men* had not been taken into account to provide for shoving the cars; it was *normally safer to shove* the cars than to kick them for the safety of the employee (S.F. 202-203).

Under the Rules of the Company, there are certain types of commodities loaded in certain types of cars and they are required to *shove* these cars to couplings, or to a rest, so that there would be *less impact on the car;* also certain merchandise and the commodities inside the car regardless of the type of car had to be *shoved;* that *shoving* means pushing the cars instead of letting them run free so they are under control and are coupled together up to where the cars stop; stopped was by means of the application of brake on the engine; the cars are then cut off and

the brakes are set on the cars to make them secure on the track where they are going to be left; *in a kicking movement they are rolling free from the engine and can be controlled only by man-power or by friction.* The only way a man riding them can stop them is by the application of a hand brake; there is a brake on each car and it is activated by *manual* application of a wheel. The wheel applies pressure on some rods underneath the car, which pushes the brake shoes against the wheel and causes the car to come to a stop and the car can be held once the brake is applied. It is the company Rule and Bulletins issued that determine how a car is handled. Inflammables, newsprint and a bulletin covers anything that is fragile, so it was their practice to *shove* those cars to a coupling or to a rest, which is also true of the passenger cars where people are in them (S.F. 356, 359). He admitted that it would probably be better to have shoved the car (on which Hullum was riding) where they wanted to leave it, but it wasn't practical; the cars involved *were not loaded;* he admitted that a man on top of the car to ride them would not receive much impact or shock, either from the kick or from jostling of the cars, if it was under the controlled movement of the engine (holding on to the cars) as it would be if he rode one that was kicked (S.F. 371-373). He admitted it could have been done just as easily by shoving the cars (S.F. 381); the force applied against the cars was not as great when they were shoved (S.F. 381-382).

In testifying in regard to his duties as *engine foreman,* and the occurrence that resulted in injury to Mr. Hullum, W. B. Bradley testified: His primary duty was to give the men the proper line-up as to the moves that were

being made or anticipated; he had to watch to see that they were doing what they were supposed to be doing; he had to see that the switches were properly aligned and the men in their proper places, so as to avoid an accident; *to see that all the men are in a safe position before the move is made; it was safety procedure to watch to see that everybody was safe before another move was made* (S.F. 170). He did not see Mr. Hullum because there were cars between him and Mr. Hullum (S.F. 182). He gave the kick signal, but he could not see Mr. Hullum and he did not see him on top of the car and did not know which end of the car he got up on; he admitted it was more desirable to know the men who were going to ride the cars were in a safe position before the kicking movement was made to be sure; the cars that were shoved to #9 came between Mr. Hullum and him (S.F. 203-205); *he was primarily responsible for the work being performed and the safety of the equipment and men;* it was also his responsibility that the men were going to be in position so they would not be hurt (S.F. 351-352); it was left to his discretion to determine whether the *engine was brought to a stop before the cars were kicked on a down-grade and was done most of the time in the Tyler Yard, particularly when people were riding the cars. The time that it was not done was when they did not have anyone riding the cars* (S.F. 379-380). He did not see Mr. Hullum after he aligned #9 switch after he crossed on the opposite side because the cars came between Mr. Hullum and him; he could not see a man on top of the car from the position he was in; the car was ten feet or something high and he was standing close to the side of the car so the engineer could see his signal; he could not see a man on top of the car unless he walked out, and he could not see them when they

were 5 or 6 cars away from him; he would not admit that he ever saw Mr. Hullum on the car, but that it was *his duty to see that the man was safe before the car was cut off* (S.F. 388-389); he admitted that he did not see Mr. Hullum even though he knew that it was a cold day and the cars had to be kicked harder in order to get them to go into the track than normally they would have been kicked had it not have been cold, and knew when kicked harder than normal it caused people to have an impact received by one on top of the car, and that when the slack is taken up in 6 cars there would be an extra slack whip up at the end of the cars; there was no rush but the kicking movement was made (S.F. 391-392). He never did know where Mr. Hullum was or whether he got to the top of the car or which way he was facing or what he was doing when he got up there (S.F. 397-398).[13]

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[13] **L. C. Foster,** switchman, acting as "pin puller" (shortfield man) of the crew, testified 19 cars were taken out of Track #6, out of #5 lead switch (S.F. 109). He pulled the pin on the 6 cars going to #9 Track. Engine was back down #5 lead track. Engine foreman Bradley was about a car length (40') east of him, close to Track #9; before "kick" given, the 6 cars were traveling 3 or 4 mph; engine bumped the 6 cars enough for him to lift the pin (S.F. 108, 112-113). First time he knew Hullum was hurt when Engine Foreman told him to get an ambulance (S.F. 115). He did not give any signals, the engine foreman gave a "kick" signal, and about 2 seconds elapsed before a flag "stop" signal was given (S.F. 116-119). He was on a straight track, as was the engine with 11 cars in front of it (after cut of 6 cars for track #9 and other prior cut), 11 cars west of Foster, and the curve in the track was about 3 car lengths east of him (S.F. 101-102). Engine Foreman Bradley gave the signals (S.F. 108).

Wm. I. Nolen, locomotive fireman, testified he was on a straight track backing up with 15 or 20 cars, but the cut of cars facing him extended down on the curved track, to his right, which had been switched down-grade. They "kicked" the cars in a forward position and shoved and dropped them;

Has Petitioner been deprived of substantial right under the FELA by the trial court refusing to submit Petitioner's Specially Requested Issues Nos. 1-A and 2-A? The Court of Civil Appeals notes that the Special Issue No. 5, which was submitted to the jury, was a much broader submission than that requested by the Petitioner in that, "It covered every aspect of negligence in the kicking operation and is a controlling issue, * * * the issue requested * * * would limit the inquiry as to whether or not it was negligence to kick the cars while on a down-grade and would, therefore, amount to nothing more than an evidentuary issue." The Court of Civil Appeals relied upon the case of *Northeast Texas Motor Lines, Inc. v. Hodges,* 138 Tex. 280, 158 S.W.2d 487 which was, in effect, overruled by the Texas Supreme Court in *Barclay v. C. C. Pitts Sand &*

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he was on the left side of the engine; he saw Hullum on top of some cars before the accident, walking toward the engine (he did not know positively it was the same cut of cars when the accident occurred) (S.F. 444-447); he walked to engine side to see someone on the ground (S.F. 448-449); it was a pretty good grade there; cars can be turned loose; some roll out and would roll out if someone didn't ride it to brake it (S.F. 450-451); he didn't know whether Hullum was dislodged from the car or fell off or knocked off (S.F. 452); it was the practice in the Tyler Yards to kick cars down an incline on to various tracks; the engineer (or he did when acting as engineer) worked according to signals (S.F. 453).

C. R. Strother's deposition was taken on October 7, 1963 (2 days before trial) concerning a statement given to Respondent. Hullum climbed up on the west end of the C & O lead car and took two steps east on the running board about the time the cars were kicked; he thought he may have made a statement "it wasn't an unnecessarily hard kick;" (S.F. 455-456). **On cross-examination,** he testified he had not had a chance to review the statement. The best he could remember Hullum was 8 or 9 feet from the end of the car, and confirmed his testimony as set out in his first deposition. On redirect examination by Respondent, he did not give Mr. Joiner a statement about where Mr. Hullum started to turn around and brace himself; cars were kicked, they didn't stop (S.F. 464).

Gravel Company, 287 S.W.2d 644. It was there held that a broad submission of "proper control" issue had no place in a charge. With the exception of a few issues, in a negligence case an injured plaintiff should be relegated to the specific acts of negligence and omissions, which had been raised by the pleadings in evidence. The *Hodges* case upon which the Court of Civil Appeals relied, was a case where the issue involved was a "proper control" issue. It cannot be said that Petitioner's requested Special Issues Nos. 1-A and 2-A are an "evidentuary issue" where the Texas Supreme Court directs that the submission should be submitted in that manner by a specific issue. The attention of this Honorable Court is called to the several cases cited at footnote 12.

Petitioner was entitled to her substantive right of having the jury consider and answer her Specially Requested Issues Nos. 3-A and the subsidiary issues inquiring whether such act was negligence and whether such negligence was a proximate cause, in whole or in part of the injuries received by J. T. Hullum (Requested Issues Nos. 4-A and 5-A).

The submission of "proper lookout" in Special Issue No. 1 was submitted to the jury under the common law doctrine of the reasonably prudent man. Such issue represented one theory of recovery raised by Petitioner's pleadings and evidence. By the refusal of Petitioner's Specially Requested Issues Nos. 3-A, 4-A and 5-A, inquiring whether the Respondent's crew kicked the cars in question without first determining that J. T. Hullum was in a safe position aboard the car he was riding, Petitioner was denied her *substantial right of presenting to the jury another theory of her recovery.* In this connection,

the Specially Requested Issues were based on the *safety rules of Respondent,* who was under a duty for the protection of its employees to adopt reasonable rules, regulations or methods for conducting its business, such as would, if properly pursued and carried into effect, afford a reasonable degree of safety to its employees while engaged in the discharge of their duties against extraordinary or unnecessary dangers. Petitioner's pleadings and the evidence, partially summarized herein, clearly raised an issue for the jury to determine under this distinct and separate theory of recovery be submitted, on the theory of violation of the Company's safety rules. *The Engine Foreman, W. B. Bradley, was charged with the duty under the Respondent's safety rules of first determining that J. T. Hullum was in a safe position aboard the car he was riding.* This, under the evidence, the Engine Foreman did not do on the occasion in question. The trial court refused the issues. The Court of Civil Appeals holds that the issues constituted "various phases of different shades of the same issue," and that it would be reversible error for the Court to submit the same controlling fact issue more than once. The Court of Civil Appeals concedes that if these Requested Issues presented an ultimate controlling fact issue not already covered in the Charge of the Court, *the denial of such an issue would be to deny a substantive right.*

Petitioner has been deprived of her substantial right to recover because Engine Foreman Bradley breached Respondent's own safety rules by failing to ascertain that J. T. Hullum was in a safe position aboard the car he was riding which represented one theory of recovery of Petitioner, but Petitioner was denied the right to have jury consider same. While there are other cases, the following support Petitioner's position the lower courts erroneously deprived

her of the right to have the jury pass on these issues: *Fisher v. Leach,*[14] (San Antonio, C.C.A. 1949) 221 S.W.2d 384, 390, writ refused N.R.E. (issues submitted to the jury represented her issues of (1) common law of negligence, and (2) the other acts, were based upon the Penal Code and the City Ordinance, so the issues did not result in a double submission of Appellee's theories of recovery); *Thompson v. Brown,* (Waco C.C.A. 1949), 222 S.W.2d 442, 449 (it was not a multiple [double] submission where issues as to two specific acts of common law negligence, negligence on the theory of *res ipsa loquitur,* and on theory of violation of the Federal Safety Applicances Act, were separately submitted); *Martin v. Texas and New Orleans Railroad Company,* (San Antonio 1964) 375 S.W.2d 554 (no double submission of Railroad Company's affirmative defense by submitting proper lookout under the common law duty and also submitting the affirmative defense of whether "the train was plainly visible and in hazardous proximity to the crossing" because the Railroad Company was entitled to its issues under the statutory duties required by Sec. 86 of Art. 6701d Vernon's Ann.Civ.Stats., an independent ground of recovery requiring, under certain conditions set forth in the statute that a motor vehicle is required to stop before proceeding across a grade railroad crossing). In another railroad crossing case, it was reversible error and required a remand for new trial, where the trial court intermingled the special issues required to submit the statutory duty requiring a motorist to stop

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[14] In this case, special issue No. 1 inquired as to whether the cab operator turned his cab to the left **without first seeing that there was sufficient space to make a left-turn in safety** based on an alleged violation of article 801(k) Vernon's Ann. Pen. Code. Special issue No. 10 presented issue on common law negligence inquired as to **whether or not the cab driver kept a proper lookout.**

before proceeding across the railroad track with extraneous issues, so that there defendant was deprived of one of its affirmative defenses. *Texas & Pacific Railway Company v. Davis* (El Paso C.C.A. 1964) 374 S.W.2d 305. In the course of the opinion, the duties of the trial court are thusly stated:

> "The Supreme Court, in *Fox v. Dallas Hotel Co.*, 111 Tex. 461, 240 S.W. 517, in a decision followed so frequently that citation of cases is prohibitive, sets out the following duties of the trial court in submitting issues to the jury: *First*, to submit all the controverted fact issues made by the pleadings; *second*, to submit each issue distinctly and separately, avoiding all intermingling; and, *third*, to give such explanation and definition of legal terms as shall be necessary to enable the jury to answer such issue." (Emphasis supplied).

While many Texas cases support the proposition that each party is entitled to submission of issues based on their theories of recovery or affirmative defenses and the failure to secure the submission of such issues is reversible error, the attention of this Honorable Court is directed to Footnote 12 in this Writ of Certiorari where some of the cases, out of many others that could have been cited, are set out.

There is little room for argument that Petitioner has been deprived of her substantial rights created under the FELA. A right to a trial by jury is a part and parcel of her remedy afforded her under the FELA. If one of her theories of recovery are not submitted to the jury by the trial court and the jury has no opportunity to consider same, she has thusly been deprived of a substantive right accorded her. For this reason the cause should be reversed and remanded for a new trial.

III. To accord Petitioner of a fair trial did the lower courts deprive Petitioner of her federally created rights under the FELA by local practice and procedure by the Court of Civil Appeals holding the trial court properly refused to submit to the Jury Petitioner's Specially Requested Instruction No. 2 reading:

> **"You are further instructed that the Defendant Railroad is under a continuing non-delegable duty to provide its employees, including the Plaintiff's decedent, J. T. Hullum, with a reasonable safe place within which to work."**

The Court of Civil Appeals held, in effect, it was not necessary to give the above instruction for the jury to consider in connection with its answer to Special Issue 9. The following instruction was given to the jury in conjunction with said Special Issue:

> "You are instructed that by the term 'reasonably safe place in which to work,' as used herein, is meant such a place with regard to safety of its employees as would be furnished by an ordinary prudent employer in the exercise of ordinary care under the same or similar circumstances." (Appendix "K," Special Issue No. 9).

It is the position of Petitioner that the jury was not sufficiently instructed concerning the meaning of the term "reasonably safe place in which to work" by the Court's failure to give a complete meaning of the phrase. For that reason, the trial court should have given an additional instruction, which was necessary to enable the jury to properly pass upon, and render a verdict, on such issue.

In *Missouri-Kansas Texas RR. Co. v. Shelton*,[15] (Dallas C.C.A. 1964) 383 S.W.2d 842, writ refused N.R.E., such an additional instruction, as well as others which Petitioner did not request in the case at bar, was given. Such instruction there read as follows:

> "You are instructed that defendant was under a duty to exercise ordinary care to furnish plaintiff a reasonably safe place in which to work, and *this duty was a continuing one even though the work may have been fleeting or infreqnent.*
>
> "You are further instructed that the duty to exercise ordinary care to furnish a safe place to work does not have reference only to the physical condition of the place itself but also has reference to the negligent acts, if any, you find of defendant's employees on the occasion in question.
>
> "You are further instructed that this duty is a duty which becomes more imperative as the risk increases."

The instruction given by the Dallas Civil Court of Appeals, and the one requested for the trial court to give in the case at bar, are in substantially the language as defined by this Honorable Court in the following cases: *Shenker v. Baltimore & Ohio RR Co.*, 374 U.S. 1, 83a S.Ct. 1667, 10 L.Ed.2d 709; *Bailey v. Central Vermont Railway*, 319

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[15] The majority of the Dallas Court of Civil Appeals, with one Justice dissenting, reversed and remanded for a new trial a judgment in favor of plaintiff, on its holding the jury's finding of a specific act of negligence proximately causing plaintiff's injury and a negative finding to the general issue inquiring whether the railroad failed to provide a "reasonably safe place to work" were in irreconcilable conflict, so there was no verdict to support the judgment.

U.S. 350, 63 S.Ct. 1062, 87 L.Ed. 1444, and such is the meaning as declared in *Western Union Telegraph Co. v. Coker*, 146 Tex. 190, 204 S.W.2d 977, 978.

Rule 277, Texas Rules of Civil Procedure, provides, in part, for the trial court to submit such *explanatory instructions and such definitions of legal terms as shall be necessary to enable the jury to properly pass upon and render a verdict on such issues* [Appendix "P"]. Was the instruction necessary? It is submitted that the refusal of the trial judge to give such instruction of a non-delegable duty of Respondent to its employees in effect deprived Petitioner of her federally created rights under the FELA. Respondent had delegated to its Engine Foreman, W. B. Bradley, the duty to ascertain that the members of his crew were in a safe position, as well as, the duty of giving signals to the locomotive engineer in the switching operation that was performed by "kicking" the cars as well as to *stop* the "kicking" movement (S.F. 351-352). The trial court refused to give Petitioner's Specially Requested Issue No. 3-A inquiring whether the cars were kicked without first determining that J. T. Hullum was in a safe position aboard the car he was riding. The trial court was under a duty to properly instruct the jury concerning the meaning of the phrase "safe place to work." The duty of the carrier or the railroad, Respondent herein, was a continuing one from which it was not relieved by the fact that Mr. Hullum's work at the place in question was fleeting. Engine Foreman Bradley considered the duty required of him by Respondent to protect freight more seriously than ascertaining where his crew were at the time he was giving signals. Therefore, under the holding of this Honorable Court in *Bailey v. Central Vermont*

Railway, Inc., 319 U.S. 350, 63 S.Ct. 1062, 87 L.Ed. 1444, such instruction to the jury was necessary and should have been given by the trial court so that Petitioner was deprived of her rights under the FELA. Such error was calculated and probably did cause the jury to render an improper verdict in this cause. This cause should be reversed and remanded for a new trial.

IV. To accord Petitioner a fair trial, the Court of Civil Appeals erred in affirming the judgment of the trial court thus holding, in effect, there was evidence raising the issue of "unavoidable accident" when in fact there was no competent evidence raising the issue, and upheld the Jury finding the event "was the result of an unavoidable accident". The answer of the Jury to the effect the event "was the result of an unavoidable accident," was a finding against the overwhelming preponderance of the evidence so as to be manifestly wrong and unjust because such judicial appraisal of the evidence deprived Petitioner of her federally created rights under the FELA.

The trial court submitted to the jury an issue inquiring whether the occurrence was not the result of an unavoidable accident. The jury found "it was the result of an unavoidable accident" (Special Issue 20, Appendix "K"). There is no probative evidence raising the issue of "unavoidable accident." Under Texas practice "unavoidable accident" is an event not proximately caused by the negligence of any party to it. *Dallas Railway & Terminal Co. v. Bailey*, 151 Tex. 359, 250 S.W.2d 379, 383, 385.

The burden was cast upon the Petitioner to secure a negative answer to this issue in order to prevail, had the jury answered negligence in her favor. The submission of such an issue was refused by the trial court in *Continental Oil Company v. Lindley,* (Houston CCA 1964 writ refused N.R.E.) 382 S.W.2d 296. In holding that the trial court properly refused to submit the issue, it was there said:

> "Under the decision of the Supreme Court of the United States in Tiller v. Atlantic Coast Line R. Co., 1943, 318 U.S. 54, 63 S.Ct. 444, it seems questionable whether the defense of unavoidable accident is available to a defendant in an F.E.L.A. or Jones Act case. In that case the court said, '. . . The Act of 1908 and the amendment of 1939 . . . leave for practical purposes only the question of whether the carrier was negligent and whether that negligence was the proximate cause of the injury.
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> "In Rogers v. Missouri Pacific Railroad Company, U.S. Sup. 1957, 352 U.S. 500, 77 S.Ct. 443, the court in speaking of the inquiry which should be made in F.E.L.A. cases stated:
>
> " 'The employer is stripped of his common-law defenses and for practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit.'

In reliance upon the above holdings, that Court concluded:

> 'It is our view that even if the defense of unavoidable accident is available in F.E.L.A. and Jones Act cases predicated upon negligence, the issue on unavoidable accident was properly refused in the instant case because there is no evidence raising such issue. An

unavoidable accident is one that occurs without having been proximately caused by the negligence of any party to the event. *If the evidence does not raise the issue that something other than the negligence of a party to the event caused the injury, an issue on unavoidable accident should not be submitted.* Dallas Railway & Terminal Co. v. Bailey, Tex.Sup. 1952, 250 S.W.2d 379; Hicks v. Brown, Tex.Sup. 1941, 151 S.W.2d 790; Hodges on Special Issue Submission in Texas, Sec. 19, p. 51.'" (Emphasis supplied)

It appears Mr. Justice Werlein is eminently correct in his view the defense of unavoidable accident is "probably not available" to a defendant in an FELA or Jones Act case. It has been judicially acknowledged the issue of "unavoidable accident" is confusing to the jury. *Good v. Born,* (San Antonio CCA 1946, writ refused N.R.E.) 197 S.W.2d 589, 590; *Texas Power & Light Co. v. Jezek* (Waco CCA 1957, writ refused N.R.E.), 302 S.W.2d 196; *Page v. St. Louis & W. Ry. Co.,* (5th Cir. 1963), 312 Fed.2d 84 at page 93. If plaintiff is successful in securing favorable answers from the jury on primary negligence, but unsuccessful in regard to the inferential rebuttal issue of "unavoidable accident", the injured plaintiff cannot secure a judgment based on the jury's finding of negligence, because there then exists an irreconcilable conflict of findings, requiring a new trial.[16] Moreover not only must an injured plaintiff carry the burden of proof on primary negligence, but such injured plaintiff must carry the burden, as part of his case, the inferential rebuttable issue to an affirmative defense of "unavoidable accident" of

[16] **Blanton v. E. L. Transport Co.,** 146 Tex. 377, 207 S.W.2d 368; **Bradford v. Arhelger,** (1960), 161 Tex. 427, 340 S.W.2d 772.

securing a finding that the event "was not the result of an unavoidable accident."[17]

In *Central Vermont Railway Company v. White,* (1914) 238 U.S. 507, 35 S.Ct. 865, 59 L.Ed. 1433, White was killed in a rear-end collision while employed as a brakeman on the Vermont Central Interstate Railway. His Administratrix sued the Company, in a Vermont Court, for "the benefit of the widow and next friend, minor children." The jury returned a verdict for $7,168.00. The railroad company claimed the State court erred in holding that, under the FELA, the burden in respect to contributory negligence was on the railroad company. Such contention was made on the ground the burden of proof as to contributory negligence was a mere matter of State procedure. In overruling the railroad's contention, this Honorable Court said:

> "For, in Vermont, and in a few other states, proof of plaintiff's freedom from fault is a part of the very substance of his case. He must not only satisfy the jury (1) that he was injured by the negligence of the defendant, but he must go further, and, as a condition of his right to recover, must also show (2) that he was not guilty of contributory negligence. *In those states the plaintiff is as much under the necessity of proving one of these facts as the other; and as to neither can it be said that the burden is imposed by a rule of procedure since it arises out of the general obligation imposed upon every plaintiff, to establish*

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[17] **Rosenthal Drygoods Co. v. Hildebrant,** Tex.Com.App. 7 S.W.2d 521; **Hicks v. Brown,** (1941), 136 Tex. 366, 151 S.W.2d 790, 793; **Dallas Ry. & Terminal Co. v. Bailey,** (1952) 151 Tex. 359, 250 S.W.2d 379, 383, 385. Cf. Unavoidable accident is not a defense to an action based on unseaworthiness, **Pope & Talbot v. Hawn,** 1953, 346 U.S. 406, 74 S.Ct. 202, 98 L.Ed. 143; **Yanow v. Weyerhaeuser SS Co.,** (9th Cir.) 250 F.2d 74; **Neal v. Lykes Bros. SS Co.,** (5th Cir.) 306 F.2d 313, and in FELA cases, **Page v. St. Louis S.W. Ry. Co.,** (5th Cir.) 312 F.2d 84 at 93, issue confuses and distracts jury.

> *all of the facts necessary to make out his cause of action.* But the United States courts have uniformly held that, as a matter of general law, the burden of proving contributory negligence is on the defendant. The Federal courts have enforced that principle even in trials in states which hold that the burden is on the plaintiff. * * * Congress, in passing the Federal employers' liability act, evidently intended that the Federal statute should be construed in the light of these and other decisions of the Federal courts. Such construction of the statute was, in effect, approved in Seaboard Air Line R. Co. v. Moore, 228 U.S. 434, 57 L.Ed. 907, 33 Sup. Ct. Rep. 580. There was, therefore, no error in failing to enforce what the defendant calls the Vermont rule of procedure as to the burden of proof." (Emphasis supplied, 59 L.Ed. 14, at page 437; 238 U.S., at page 512).

The Texas practice, in respect to the issue of "unavoidable accident" is such that if negligence is proved in a FELA case and the issue has been given to the jury, but the jury finds "it was an unavoidable accident", there is an irreconcilable conflict so no judgment may be entered by the trial court. But, if the injured plaintiff is not successful in securing a finding of negligence, and the jury also finds the event was the result of "an unavoidable accident" the answer of the jury to "unavoidable accident" is *immaterial.* Such was the holding in an FELA case, *Adkins v. Texas & P. Ry. Co.* (Fort Worth CCA 1950, writ refused) 233 S.W.2d 956, where it was said:

> "Other findings of the jury being to the effect that neither appellant nor appellee was negligent, the unavoidable accident issue, or any alleged error with respect thereto, becomes immaterial. Brown v. Dallas Gas. Co., Tex.Civ.App. 422 S.W.2d 869, writ refused."

In *Wheeler v. Glazer,* (1941) 137 Tex. 341, 153 S.W.2d 449, it was there said:

> "The only legitimate purpose to be served *in submitting unavoidable accident is to call the matter to the attention of the jury, so that it will not be overlooked, and so that the jury will understand that they do not necessarily have to find that one or the other parties to the suit was to blame for the occurrence complained of.* This purpose is fully accomplished when the jury is told that the ocurrence in question was an unavoidable accident if it happened without the negligence of either of the parties to the suit." (Emphasis supplied).

When the jury's answer to Special Issue No. 20 (the occurrence was the result of an "unavoidable accident") is considered along with that failure of any proof the occurrence was the result of anything other than the acts of the Respondent's switching crew; that no outside force or agency intervened in any degree at all; that the acts of the Respondent's switching crew making the movement were the only forces applied, such Issue was not raised by the evidence; therefore, there was no evidence to support anything other than an answer that the occurrence could have been avoided, it is obvious that the jury disregarded the evidence so its answer was contrary to the overwhelming weight and preponderance of the evidence so as to be manifestly wrong and unjust. In other words, the jury did just what the State courts say is the legitimate purpose of submitting unavoidable accident, that is, the jury will understand they do not necessarily have to find that one of the parties to the suit was negligent. The issue of "unavoidable accident" should never be an issue in an FELA case. The jury is thus free to *speculate* rather than consider whether under the evidence fair-minded men could reach the conclusion the evidence justified, with reason the negligence of the employers played any part in

the employee's mishap. *Rogers v. Missouri Pacific Railroad Company,* 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed. 2d 493 and the cases cited therein, and a multiple of cases that have followed the holding of that case.

A jury was not free to speculate in the case at bar. That it did so is made crystal clear by virtue of its finding that the event was a "result of an unavoidable accident" The attention of the jury was distracted from the focal point of view, that is, whether the negligence of employer played any part in the death of J. T. Hullum.

In *Pleasants v. Fant,* 89 U.S. 116, 22 Wall. 116, 22 L.Ed. 780, this Court announced a settled rule that: "A Court must, in relation to the jury, protect parties from unjust verdicts arising from the ignorance of rules of law in evidence, from the impulse of passion or prejudice, or from any other violation of his lawful rights in the conduct of trial. This Court should analyze the facts or by a reexamination of the facts determine whether the Federal decisional law has been improperly applied to the facts, as this Court did in *New York Times Company v. Sullivan,* 376 U.S. 254, 287, 84 S.Ct. 710, 729, 11 Law Ed.2d 686, 95 ALR 2d 1412. Petitioner has been deprived of a fair trial in the State court so that, in effect, her Federally created rights under the FELA have been taken away from her, as well as her right to a fair jury trial under the Seventh Amendment to the United States Constitution, Amend. VII, U.S. Code, which is a part and parcel of her remedy afforded under the FELA. Petitioner is the victim of an unjust verdict and judgment.

It should be clear that such an answer "unavoidable accident" by the jury in the case at bar, was contrary to the

great weight and overwhelming preponderance of the evidence as to be manifestly unjust and clearly wrong where the evidence did not even raise the issue. In *Dallas Railway & Terminal Co. v. Bailey*, 151 Tex. 359, 250 S.W.2d 379 at page 383, it is said:

> "Because of the uncertain state of the authorities upon the question, we have had a full conference with a free discussion of the question, and have decided to hold * * * that if the evidence does not raise the issue that something other than the negligence of one of the parties (to the event) caused the injuries, then it does not raise the issue of unavoidable accident."

Respondent contends, and the contention was upheld by the State court, the issue was raised by reason of the history of the injury found in the Cotton Belt Hospital Records (Ptf's Exh. 1) recorded by Dr. Boosalis as follows: "He was on top of the car (moving) trying to get from the car to the next. Then lost his balance. Fell between the 2 cars on the ground." Should it be conceded decedent was free of the effects of sedatives that had been given to him for the trip by ambulance from the Mother Frances Hospital at Tyler to the hospital at Texarkana, such statement would be a matter for the jury to consider in determining whether or not decedent's contributory negligence was a proximate cause of his injury. The question posed would be did he lose his balance because of a failure to stop the engine before the "kicking" movement after the pin had been pulled? There is testimony that most of the time the engine was stopped before the kick by the engine foreman. On this occasion, the engine was not stopped. Was Mr. Hullum's timing off because the usual practice was not

followed? It was conceded No. 9 was a fast track and admittedly on a down-grade.

The attention of this Honorable Court is directed to *Owens v. Union Pacific R. Co.* (1943), 319 U.S. 715, 63 S.Ct. 1271, 87 L.Ed. 1683. The question posed there was whether Owens assumed the risk of death in the switching activities in which he was engaged when the accident occurred. It was there said assumption of risk took over, in misguided application, large legions of the law of negligence. What in fact was absence of departure from due care by defendant came to be labeled "assumption of risk." After noting Congress swept into discord "the maze of law," when in 1939 it amended the Employers' Liability Act to abolish the defense of assumption of risk, this Honorable Court pointed to a few lodestars. After determining, it was not necessary to decide whether the amended Act applied because suit was brought after the amendment but the accident occurred prior to 1939, it was there said:

> "In this case, if there was negligence upon the employer's part, as to which we express no opinion, it lay either in the company's failure to enforce Rule 30, if that rule was applicable to switching operations, or in the negligence of a fellow servant of Owens and nothing more than that. In the former case, assumption of risk would not apply, at any rate as a matter of law, in the absence of conclusive proof that the employee knew the rule was not applicable or had been abandoned and elected to take his chances in crossing the track."

and continuing, it was said:

> "As has been shown, respondent has not sustained this burden. That is true, whether the inquiry is couched in terms of Owens' actual knowledge and deliberate choice or of the 'obvious' and 'apparent' character of the risk. For to prevail on this defense, respondent had the burden of persuading the jury that the risk of being run down was 'so plainly observable' that Owens was in fact aware of it and decided to chance it. Less than that, under this statute, would be no more than contributory negligence, which cannot be interchanged or overlapped with assumption of risk as a defense. The jury decided that respondent had not sustained the burden imposed." [319 U.S. at 724]

In the case at bar, the conclusion is inescapable Petitioner was deprived of a fair trial in the State court where the jury found the event was "an unavoidable accident". The answer of the jury is contrary to the great weight and overwhelming preponderance of evidence as to be clearly wrong and manifestly unjust. Respondent's argument is no more than such issue takes the place of the old concept of "assumed risk." It is respectfully submitted this Honorable Court should take jurisdiction of this case because there can be no uniformity of cases brought under the Act by a Texas litigant under the State court practice that allows the jury to escape its function in a FELA case by a finding of "unavoidable accident" rather than determining whether Respondent's negligence played any part in the mishap. By reason thereof this cause should be reversed and remanded.

V. Petitioner was not accorded a fair trial where, over the timely objection of Petitioner, prejudicial evidence was adduced by Respondent in the presence of the Jury, as follows:

(a) Respondent's agent and vice-principal W. B. Bradley, Engine Foreman of the switching movement, testified concerning a conversation with Petitioner's decedent to the effect he did not blame anyone for his injury because such testimony was clearly inadmissible as a self-serving statement, hearsay and a conclusion on the part of the alleged declarant, related by an interested witness (absolving himself from negligence acting on the occasion in question as the representative of Respondent).

(b) Respondent's agent and vice principal W. B. Bradley, Engine Foreman of the switching movement that resulted in the death of J. T. Hullum, Petitioner's decedent, supervised a "staged" motion picture experiment of a "kicking" operation in the Tyler switching yards that did not purport to show substantially the conditions that actually existed in the "kicking" operation that resulted in the death of J. T. Hullum, on December 13, 1961, and no other member of the switching crew other than the Engine Foreman Bradley was present at the time the "staged" motion picture experiment was made and the same engine or type of boxcars involved were not used in such motion picture experiment.

The Court of Civil Appeals erred in holding such evidence set forth in (a) and (b) competent, when, in fact, such evidence was incompetent and highly prejudicial to Petitioner in pursuit of her remedy, federally created rights under the FELA.

These two subdivisions of prejudicial evidence (permitted to be introduced into evidence) have been grouped together because each represent a violation of substantial rights de-

nied Petitioner under the FELA. However, the principle is common to each subdivision that no substantive right of any party to an action under the FELA may be impaired by any local statute, rule, or decision or forms of local practice. This immunity has been extended to the pleadings where it has been held that a State's rule that a pleading will be construed strictly against the pleader had no application in a suit in the State court under the FELA. *Brown v. Western Ry. of Alabama*, 338 U.S. 294, 70 S.Ct. 105, 94 L.Ed. 100. Moreover, what constitutes negligence for the Statute's purposes in a federal question and a State court is governed by federal decisional law in formulating the concept of negligence. *Dice v. Akron, C & Y. Ry. Co.*, 342 U.S. 359, 72 S.Ct. 312, 96 L.Ed. 398; *Urie v. Thompson*, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282. If evidence is received by a jury which ought not to have been received by it, the conclusion is inescapable such evidence affects the verdict so that, in effect, there has been a denial of the right of trial by jury, a substantial right under the FELA.

Subdivision (a):

The trial court admitted into evidence, over the timely objection of Petitioner,[18] the following testimony of Engine

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[18] The objection made by Plaintiff's counsel was as follows:
"MR. SCHMIDT: Object to that, Your Honor, down to line 5, page 30, as being a self-serving declaration by an agent who was in charge of the work, and obviously an answer that justified his own misconduct, since the man is not here to verify the self-serving declaration on the part of the defendant. It is his witness, not our witness. Calls for a conclusion on the part of the witness, invading the province of the Jury. Whether he personally held ill will is not a question.
"THE COURT: Yes, but the question is what did he say.
MR. SCHMIDT: Object to the questions and answers begin-

Foreman, W. B. Bradley, agent and Vice-principal in charge of the switching movement in question:

"Q. Did you see him—referring to Mr. Hullum—'any more after that?'

A. Yes, I visited him in the hospital.

Q. Here in Tyler?

A. Yes.

Q. All right, did you talk to him?

A. Yes.

Q. Did he tell you anything about what had happened?

A. No, sir. Other than he said he didn't hold any member of the crew responsible or feel any ill feeling toward any member of the crew about the accident." (S.F. 209)

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ning at line 1 page 30, ending line 5, page 31, also the question beginning line 19, page 30, and ending line 22, page 30.

THE COURT: I haven't looked at but one question and answer.

(At Bench) MR SCHMIDT: The same question is asked again.

"For the further reason that the same is a self-serving declaration on the part of the witness, who was the actual agent and foreman of the job who is responsible for the movement and the safety of the crew, and is in the nature of justification, made out of the presence and hearing of and is hearsay so far as this Plaintiff is concerned. Invades the province of the Jury, calls for a conclusion.

"Because it is the Jury's duty to determine who is responsible for his accident, and whether he held any ill will against them or not is immaterial; and whatever Mr. Hullum —if this is a true statement, which we doubt seriously that he made any such statement—it would not be binding upon this Jury, and would be in the nature of a prejudicial self-serving statement, wholly immaterial.

"For the further reason that the Plaintiff's wife would not be permitted to testify as to any conversation with the decedent under the Dead Man's' Statute, and there was no way this type evidence could be combatted or rebutted, and it is highly unfair and improper.

"THE COURT: Overrule the objection". (S.F. 207-208).

The testimony of the witness Bradley is nothing more than a self-serving declaration of an agent in favor of his principal and therefore inadmissible. Such testimony did not relate to a conversation taking place within a short period of time after the injury. *Texas Jurisprudence*, 2nd Vol. 24, pg. 160, Sec. 611.

The testimony of the witness Bradley was also objectionable as being in the nature of an opinion invading the province of the jury. It was the jury's function to determine who was to blame for the Plaintiff's decedent's injury and death. The evidence admitted was of the type that is not only hearsay, self-serving but also opinion evidence for which no predicate was laid to show that the Plaintiff's decedent was in possession of all of the facts to know who was to blame, and that such knowledge was of such a highly technical nature that a jury would need such expression to determine the issue other than from the facts adduced. *Texas Jurisprudence*, 2nd Vol. 23, pg. 715-716, Sec. 507.

The Court of Civil Appeals holds such testimony is admissible. Respondent contended such testimony was admissible, relying upon *Hovey v. See*, (Tex.Civ.App.), 191 S.W. 606 as one almost an identical situation as presented in the case at bar. There the surviving widow brought suit for the death of her husband, a locomotive engineer for the railroad company. En route to the hospital via ambulance See stated to the owner of the ambulance, Robinson, that "he did not blame anybody for the accident; that it was caused simply because he stood up there and let an engine run over him," which was excluded by the trial court. On appeal, it was held such excluded testimony was admissible

under the *res gestae* rule[19] or against the interest of the party making the statement. The contention was there made that the exclusion of the evidence was harmless because similar evidence was admitted, without objection, from employees of the company, but the court overruled this contention on the basis the jury might have believed Robinson and discredited the testimony of the employees.

There is a striking dissimilarity from the factual situation in the case at bar from the above cited case upon which Respondent relies. Petitioner's decedent was taken to the Mother Frances Hospital at Tyler, Texas immediately after he was hurt by ambulance. Mr. Hullum was conscious while in the Switch Yards, *but no statement or declaration against interest was then made to Engine Foreman Bradley or in the presence of any other member of the crew who came to his aid.* The Mother Frances Hospital Records (Ptf.'s.Exh.#2) reflects Mr. Hullum was brought there at 12:20 o'clock p.m. December 13, 1961. He was given morphine shortly after he left the operating room. The history there shows Mr. Hullum fell under the train at work, and caught between two box cars. Shortly after he was removed from the operating room, a blood transfusion was given to him and another the following day, as well as fluids were forced. The third day the doctor gave orders Mr. Hullum could elevate his head 3 or 4 inches. The Hospital chart is replete with doses of morphine given him, tranquilizers (vistaril, mil-

[19] Respondent makes no contention the **res gestae** rule is applicable. No statement was made by Mr. Hullum at the scene, or shortly thereafter to bring such a statement within the rule. **City of Houston v. Quiones**, 142 Tex. 282, 177 S.W.2d 259; **Pacific Mutual Life Ins. Co. of California v. Schlaksug**, 143 Tex. 264, 183 S.W.2d 709.

town), barbiturates (seconal, demerol) as well as empirin tablets. A letter addressed to Dr. Hibbitts at Texarkana from Dr. Hurst, dated December 21, 1961 states a spika (spica) shoulder cast had been applied that day, wherein it is said, "if he is stable we will transfer him to Texarkana [next morning]" (Ptf.'s.Exh.#1). Among other injuries, Mr. Hullum sustained a mangled right arm. Dr. Milton Freiburg, called in to assist Dr. Hurst in the treatment of Mr. Hullum at Tyler, believed amputation was indicated because his hand was useless, but Mr. Hullum died from other complications before this was done. Dr. Freiberg testified by deposition that the type of injury Mr. Hullum had required quite a bit of narcotics—"doses of narcotics tend to make one a little indifferent to problems" (S.F. 294-295).

Respondent made no showing of the physical condition of Mr. Hullum at the time the purported statement was made. In fact, Engine Foreman Bradley could not recall when he made the statement at the Tyler Hospital. It was said, in *Smith v. International & G.N. R. Co.,* (Tex.Civ. App.) 78 S.W. 556, writ denied:

> "It was clearly shown that Smith was conscious and his mind clear when he said that he was asleep on the track when struck by the train. The declaration was against his interest. It would be extremely improbable that such declarations would be false. He must have known whether he was asleep or not when he was injured."

The Texas Supreme Court held it would require some additional predicate to that disclosed by the record to admit in evidence a statement attributed to defendant's wife,

Mrs. Howlsey, that "Robert shouldn't have done that," as testified to by plaintiff, in *Howsley & Jacobs v. Mrs. W. S. Kendall, et al* (Tex.S.Ct. 1964), 376 S.W.2d 562, 567. Mr. Kendall had died as the result of an explosion and Robert was an employee of the defendant. In saying that the statement should not have been received in evidence as an admission, it was pointed out that Mrs. Howsley was not at home at the time of the explosion; *her purported statement was conclusory in nature* and appeared to have been a chance remark made in a conversation at the hospital where Kendall and Robert Myers were taken after the tragic explosion.

There is an irreconcilable conflict in the decisional law, as pointed out at 31 A C.J.S., Evidence §272d p. 700 where it is said for an admission or declaration against interest to be competent a statement must be *one of fact* and a statement which is mere opinion with respect to a matter in issue or conclusion or a legal conclusion of law is, as a rule inadmissible. At page 702, it is said that a declaration his adversary was free from fault, comes within the general rule excluding opinions or conclusions. In recognition that there is a conflict in the decisional law, the burden was upon Respondent in the case at Bar to show that such declaration against interest attributed to Mr. Hullum was *voluntary* and had the capacity to comprehend statement. Such a statement is *not admissible* where it is not shown that the injuries received by the party or a drug administered to him prior to the giving of the statement had such an effect on him that he could not intelligently answer questions and protect his rights. 31 A C.J.S. Evidence §278, pp. 708-709.

It is respectfully submitted no proper predicate was laid by Respondent to entitle it to adduce such testimony from Engine Foreman Bradley. Moreover, such testimony was self-serving in as much it was Bradley's negligence that caused the injuries.

It is quite obvious the testimony was designed to support Respondent's theory that no one was to blame (or at fault) for the fatal injuries of Petitioner's decedent. Engine Foreman Bradley could not recall exactly when Mr. Hullum made the statement at the Tyler Hospital. It is the settled law that when the appellate court comes to apply the law to testimony constituting the facts of the case it can only base its conclusions upon such testimony as is under the law competent. That which is not competent should be given no probative force. *Henry v. Phillips*, 105 Tex. 459, 151 S.W. 533, 538.

Should it be conceded there was a showing Petitioner's decedent voluntarily made the statement and had the capacity to comprehend and was in possession of all facts to know who was to blame, the attention of this Honorable Court is directed to the following cases where it was held that such testimony was not admissible into evidence or should not have been admitted, if proper objections had been made: *Isaacs v. Plains Transport Co.* (S.Ct.), 367 S.W.2d 152; *Red Arrow Frt. Lines v. Gravis*, 84 S.W.2d 540 (no writ history); *Texas & Pacific Ry. v. Porter*, 360 S.W.2d 568 (writ ref. N.R.E.); *Southerland v. Porter*, 336 S.W.2d 841 (writ ref. N.R.E.); *Zepeda v. Moore*, 153 S.W.2d 212 (Tex.Civ.App. Writ dism.); *A.B.C. Storage & Moving Co. v. Herron*, 138 S.W.2d 211 (writ dism. judgment correct); *Tiner v. Yellow Cab Co.* (Tex.Civ.App.),

74 S.W.2d 521 (writ dism.); *Reynolds v. Texas Iron Works, et al.*, 72 S.W.2d 299 (writ ref.); *Webb North Motor Co. v. Ross*, 42 S.W.2d 1086 (writ ref.); *Ischar v. West Texas Utilities Co.* (Tex.Civ.App.), 54 S.W.2d 842 (writ refused); *Texas Employers Ins. Assn. v. Sewall* (Tex. Civ.App.), 32 S.W.2d 262 (writ ref.); See also *Gause-Ware Funeral Home v. McGinley* (Tex.Civ.App.), 21 S.W.2d 347-348 (no writ history); *Williams v. Fuerstenberg*, 12 S.W.2d 812 (Amarillo C.C.A.); *National Union Fire Ins. Co. v. Richards*, 290 S.W. 912; *Tarwater v. Donley County State Bank*, 277 S.W. 177; *Sparks v. Johnson*, 235 S.W. 975 (no writ history); *Hines v. Collins*, 227 S.W. 332. (no writ history); *W. F. Norman & Sons v. Clark*, 221 S.W. 235 (no writ history); *Negociacion Agricola Y Ganadera De San Enrique v. Love*, 220 S.W. 224.

It is respectfully submitted the trial court erroneously admitted into evidence the prejudicial testimony of Engine Foreman Bradley, over Petitioner's timely objection.

The presumption obtains Petitioner's decedent was exercising due care for his own safety. *Tennant v. Peoria & P. E. Ry. Co.*, 321 U.S. 29, 64 S.Ct. 409, 88 L.Ed. 520. It clearly had the effect to distract the jury from the testimony of Switchman Strother who testified the car was "kicked" out from underneath Mr. Hullum on the occasion in question. This Honorable Court should take jurisdiction of this case and settle the law whether such declaration is admissible in evidence in an FELA case.

Subdivision (b):

The theory of Respondent's defense was primarily on the ground that at the time Petitioner's decedent sustained injury while involved in a switching operation in

the Tyler Yards such switching movement was a customary one, without negligence on the part of Mr. Hullum or Respondent under its plea the occurrence was the result of an "unavoidable accident", an affirmative defense, but the burden to prove the event was not the result of an unavoidable accident shifted to Petitioner to prove the event was "not the result of an unavoidable accident". While there was a plea of contributory negligence as an affirmative defense, which Respondent sought to support on the basis that Petitioner's decedent's statement to Engine Foreman Bradley at the Tyler Hospital and the hearsay statement in the Cotton Belt Railroad Company hospital in Texarkana and by taking a second deposition of Mr. Strother, the only eye witness, a few days before the trial began on October 7, 1963, The trial court would not permit Petitioner to develop any evidence that other employees who had been injured in the Tyler Switching Yards. A few days before trial, to-wit, on September 25, 1963 Engine Foreman Bradley, at the direction of Respondent, arranged for a motion picture film to be taken depicting a kicking movement or switching movement experiment made out of court and without the presence of Petitioner and only a selected few of the switching crew to which Mr. Hullum was assigned at the time he sustained his injuries. Counsel for Petitioner timely objected to the "staged" motion picture experiment, before viewing the film and after viewing it out of the presence of the jury, which objections were overruled by the trial court.[20]

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[20] "MR. SCHMIDT: Your Honor, we have an objection to it first, the predicate here has failed to reveal that this operation which was photographed was the same operation which occurred at the time Mr. Hullum was injured. Certainly shows that the conditions were not the same, the personnel

The motion picture experiment was shown to the jury. After it was completed counsel for Petitioner cross-examined Mr. Jay Oistad, the producer of the film, and

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was not the same, even in running the engine. That the movement was staged, that everyone knew exactly what was going to happen, and the circumstances as they were testified by the witnesses here by deposition as to what occurred are not the same testified to (as) on the film; therefore it is not a correct and true portrayal of the occurrence. * * *

"We add to our previous objection, after viewing the film, the following reasons in addition to those already stated. This is obviously, after viewing the film not a reenactment of what occurred on the occasion in question; but an entirely different move. The testimony in the case being that Mr. Hullum had mounted the car and had gone towards the center of the car and had turned and was facing the movement.

"In none of these pictures was the man on top of the car towards the center and facing the movement, but was at all times either riding on the side of the car or at the hand brake itself when the car was released.

"Secondly, in none of the pictures was the kick movement being made in comparison or similar to the kick movement testified in this case, or the case in question; but was made differently, in that first, the speed is obvious. The speed was at less speed. The pin puller was moving along at a slow rate of speed, not even 3 miles an hour, because he was barely shuffling his feet, and the Court knows that at 3 miles an hour, the marching time in the Army is 120 steps per minute, and this man was obviously walking about a mile (an hour).

"For the further reason that there was no kick made on this occasion at all, but that it demonstrates the fact that there was no bumping of the cars, but merely a pulling of the pin without any further movement of the engine at all. The car moved away at a very slow rate of speed, without a man on top.

"Consequently, it is not a reenactment of what occurred, not the same conditions and, of course, was not even the same time of the year or the same temperature. Further, they are not the same types of cars that were involved, the same load, the weight of the train not being the same, or shown to have been the same, In fact, the pictures themselves indicate that instead of having 6 box cars, they had one box

recalled Engine Foreman Bradley for further cross-examination who had remained in the courtroom to view the film. One portion of the film showed a single car going down by itself and one showing a cut of six cars, but the move

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car, 4 gondola cars, and 1 other car, a box car on the other end.

"There is no showing that the load was the same or the cars were the same, and further the testimony already demonstrated that there was a different engineer, there was a different engine involved, and under the circumstances, these pictures would add nothing to the Jury's knowledge except to show a different situation than the one they would have to pass upon; and therefore, they are wholly immaterial and improper, and should be excluded.

"They would be self-serving declarations or demonstrations on the part of defendant, and there is no proper predicate laid to show that the occurrence that transpired in the motion picture was the same as the occurrence that happened at the time that Mr. Hullum was injured. * * *

"Then, without waiving our objection, but, since the Court has ruled, we ask that the Court instruct the Jury that the pictures be received in evidence on a limited basis. And that is, that these pictures show only what they show, and that they are not the same as it occurred out there, and that they are for a demonstration of the type of movement that was being made at the time the pictures were taken and not at the time the accident occurred, because obviously it could not have been, and the Defendant has already so qualified the witness, Bradley, in his questioning that it was not the same, but was as close as they could come to it. So, therefore, not being the same, it would have to be limited to the showing that this is a type of kick movement that Mr. Bradley made at the time, and contending that it was as close as he could come, and then it will be for the Jury to determine whether or not it would be a fair representation.

"We contend, of course, in the first analysis that it is not a fair portrayal of what occurred, therefore, it would be a demonstration, and as demonstrations and experiments are not permissible in evidence, this thing, it would not be proper in this case to have a demonstration or experiment that is not identical."

(S.F. 421, 422, 423, 424).

The Court overruled the objection.

was not completed. The cars were barely "turning", where a break could be seen. Another portion showed where six cars were cut off, and in the middle, there was confusion in the picture, and then it showed again a cut of cars made close up.

Mr. Oistad testified: two cameras were not used but one camera. The camera was moved from an embankment to a part even with the switch. He did not know how fast the cars were going. He noticed the cars appeared to pick up speed. The temperature was in high 80's or 90; and the picture was taken about 10:00 o'clock in the morning (S.F. 427-28). *On redirect examination* by counsel for Respondent, Mr. Oistad testified that the times when the camera (hand roll) would run down so the picture could not be completed, but those were not shown to the jury. The sequence shown to the jury showed the break (camera) and the "kick" took place almost simultaneously. The motion picture producer took the film with him to be spliced and was brought back to the Court Reporter (designated as Def's Exh. #12), and is a part of the Record filed in this court.

On the date Mr. Hullum sustained his injuries, to-wit, December 13, 1961, the weather was cold so that the men were "bundled up" in winter clothing. The maximum temperature was 35° and minimum 18° Fahrenheit (S.F. 412, Ptf's Exh. #s 13 and 14). In the cut of six (6) cars, at the time Hullum was injured, he boarded the lead car of the six car cut, a C. & O. car, equipped with a staff brake and in front of that car was a Union Pacific car which was higher than the C. & O. car, which Mr. Hullum boarded and reached the top. The other four cars in the cut were empty boxcars. The cut of six cars used in the film was a boxcar on each end of the cut, and

between these boxcars were four (4) loaded gondolas (with ties *loaded* on the gondolas) in the middle of the cut. The man in the film, who lifted the pin, was moving very slowly .with those [film] cars and at the time the film was made there was no "kick" or "bump" to the cars; the speed of the cars, as they traveled down the track, was around 3 m.p.h. in the film, and the boxcars and gondolas were arranged so a man could be seen standing on a boxcar. The same engine was not used nor the same engineer at the time the film was made as were used and working when Petitioner's decedent was injured. (Bradley S.F. 407-9; 415, 414-415; 433-37). In the film, if a man was on one of the cars, he was either at the *brake platform on top of the car or riding the side of the car.* Everyone who participated in the production of the film knew what was to be done (S.F. 408); several attempts were made before the cameraman made a picture of the completed move, and *no one who participated in staging the film would ride the boxcar in the position that Hullum was in on top of the lead car at the time the "kick" was made or in the position Mr. Strother testified he was in at the time the cars were "kicked out" from underneath Mr. Hullum.*

The result of the motion picture experiment which the trial court permitted to be shown to the jury, in the case at bar, was to show to the jury a *controlled movement* of the cars involved and of a man pulling or lifting a pin in the performance of a *different type of switching movement* than the one involved at the time Hullum sustained serious bodily injuries that produced his death. The motion picture did not depict any bustle or hurry ordinarily involved at the time a regular switching movement is made by members of a switching crew in the performance of

their duties and required by Respondent in either assembling a freight train or separating a freight train so the cars may be dispatched to their proper destination.

It is difficult to see why the showing of the motion picture experiment to the jury, as was done in the case at bar, is different from the prejudicial evidence adduced, in the case of *Missouri-Kansas Texas Railroad Co. v. McFerrin*, 156 Tex. 44, 291 S.W.2d 931 (1956). There the decedent's "habit" of stopping the car before going across the grade crossing in question, was held improperly admitted into evidence because there was an 'eye-witness' to the accident in question, and on this ground the cause was reversed and remanded for a new trial.

The applicable rule for an experiment made out of court and without the presence of the opposing party for it to be admissible is there must be a *substantial* similarity between the conditions existing at the time of the occurrence which gives rise to the litigation and those in existence at the time the experiment is conducted for demonstration purposes. In *Fort Worth & Denver Railway Company v. Williams* (Tex.Sup.Ct. 1964) 375 S.W.2d 279, it was held that the motion picture experiment was not sufficient in law to meet the requisites of admissibility. The judgment was reversed and remanded for a new trial on the ground the motion picture experiment was confusing or misleading to the jury.

Dean Wigmore has discussed at some length the dangers inherent in the use of both still photographs and motion pictures of artificial settings. *Wigmore on Evidence* (3rd Ed.) §§798-799, Vol. 3, pp. 201-208.

In *La France v. New York, New Haven & Hartford Railroad Co.*, (3rd Circuit) 292 Fed.2d 649, it was claimed

that the trial court abused its discretion in refusing to let the railroad conduct certain experiments at a switch. The type of experiments sought to be conducted were not at the switch involved in the accident when one request was refused by the trial court. The conditions existing at the switch when the railroad company sought to conduct another experiment a year and a half after the accident when conditions had changed did not show any abuse of discretion on the part of the trial court. The judgment in favor of the plaintiff was affirmed.

It is respectfully submitted in the case at bar, there was no substantial similarity between the experiment conducted and the conditions existing at the time Mr. Hullum sustained his injuries that produced his death. Moreover, it was substantially different from the testimony of the witnesses who testified concerning the events on the day Mr. Hullum was injured. The motion picture experiment was calculated to confuse rather than aid the jury to the prejudice of Petitioner. It is recognized that the operation of switching railroad cars is a dangerous occupation for a Switchman. It is wholly unlikely that a "staged" production of a switching operation would remotely resemble an operation as it is conducted day in and day out in the Tyler Yards. Respondent apparently was unwilling to reproduce on a motion picture film one of its regularly scheduled switching movements in the Tyler Yards substantially similar to the one involved when Mr. Hullum was injured for the jury to view. Engineer Bivins, who actually moved the switch-engine[21] at the time Mr. Hullum was injured, did not participate in the motion picture experiment and neither did C. R. Strother, the only eye-

[21] A differently numbered switch-engine was used in the motion picture experiment.

witness who saw Mr. Hullum fall from the top of the boxcar when the car was kicked out from underneath him. It appeared to the witness Mr. Hullum was braced facing the engine. While Respondent took Mr. Strother's deposition a few days before trial, his testimony, nevertheless, supports an inference the timing may have been off when the kick was made without the engine stopping before proceeding with the kick. While Fireman Nolen participated in the experiment, he testified he did not receive signals from the Engine Foreman when Mr. Hullum was injured. There could be no inference the engineers would handle an engine in the same manner in response to signals by the Engine Foreman. Under the circumstances of this case, the showing of the motion picture experiment was highly prejudicial to Petitioner.

The character and amount of evidence required to establish negligence in a suit under the FELA is a Federal question. A piece of evidence viewed by the jury as the jury did the motion picture experiment presenting events wholly unrelated to what occurred on the day Mr. Hullum sustained his injury denies to Petitioner a fair trial by jury of the events that actually occurred on the day Mr. Hullum sustained the injuries that produced his death.

By reason of the prejudicial evidence adduced before the jury as set forth in subdivision (a) and (b), this Honorable Court should entertain jurisdiction of this Petition and grant to Petitioner a new trial.

VI. Is the Petitioner precluded in this FELA case from securing a new trial because it calls upon this Court or an Appellate Court to examine the whole record to determine whether the facts support the judgment rendered adversely to Petitioner, based on

the Jury's Findings to Special Issues Nos. 1, 3, 5, 7, 9 and 20 that exonerates Respondent of negligence, under the holding of this Court in *Deen v. Hickman*, 358 U.S. 57, 79 S.Ct. 1, 3 L.Ed. 2d 28? If so, how may such a Petitioner under the FELA secure relief where she has been deprived of her federally created rights under the FELA because there has been no proper judicial review of the evidence according to the correct principles of law by an Appellate Court?

In order not to unduly lengthen this Petition for Certiorari, Petitioner respectfully refers this Honorable Court to the original Statement, (pp. 9-16) and the statements set out under Questions I through V, pp. 25-32, Footnotes 13, 31-32).

The jury returned negative answers to Special Issues Nos.: 1. (proper lookout); 3. (whether the cars were switched at an excessive rate of speed); 5. (whether kicking of the cars was negligence); 7. (whether the cars were kicked harder than they would have been kicked by an ordinarily prudent person); 9. (failed to provide a reasonably safe place in which to work) and answered Special Issue No. 20, that the ocurrence was the result of an unavoidable accident (Tr. 45).

It is the position of Petitioner that each of such answers was contrary to the evidence and so overwhelmingly against the weight and preponderance of the evidence as to be manifestly wrong and unjust.

Engine Foreman Bradley admitted he did not see Mr. Hullum after he crossed the track to board the boxcar on the fireman side of the engine. The cut of cars then came between them. He did not see Mr. Hullum again until after he was injured. Bradley could not see Mr. Hullum on top of the boxcar because he was on the ground near

the track to give signals to the Engineer and the boxcar was about 10 feet high. There is no testimony of any system for relay of signals among the crew members.

There was considerable testimony that under the Rules of Respondent that certain boxcars and cars of other types used for carrying commodities of a certain type that these cars would not be switched by the "kicking" method but would be shoved. There was no such Rule to protect the safety of the crew engaged in the switching operation because it was not practical. The record is replete with testimony that it was not necessary to kick the cut of 6 cars involved in the switching movement at the time Mr. Hullum was injured for the reason it was *down-grade* and was a *fast track*. This meant, of course, that after the pin was pulled the cut of cars would roll on their own momentum so the switching movement could be accomplished without the engine kicking same, which had the effect of making the cars roll faster. There was also testimony that it was the practice in the Yards on most of the switching operations wherein the cut of cars were "kicked" by the engine that before the "kick" was made, the engine would stop. On the occasion of the incident resulting in injuries to Mr. Hullum that produced his death, the engine did not stop before proceeding with the "kick".

At the time the engine bumped the cars in this kicking operation, Engineer Bivins estimated the speed of the engine was 6 to 8 m.p.h. and there is no evidence contrary to his estimate. Engine Foreman Bradley estimated the cut of cars was rolling 5 or 6 m.p.h., but as they continued rolling down-grade on fast track #9 there is a reasonable inference the cut of cars gained momentum. Even using the estimate of Engine Foreman Bradley, such speed was in excess of Respondent's Rule for handling loaded cars.

In response to Special Issue No. 9, the jury's negative finding that Respondent furnished Plaintiff's decedent a reasonably safe place in which to work, is contrary to the evidence. The Engine Foreman did not know and could not see that Mr. Hullum was in a safe place or ascertain that he had reached the brake platform such action by the jury in disregarding undisputed evidence should not be permitted.

When we come to Special Issue No. 20 (the occurrence was the result of an unavoidable accident) is considered along with that failure of any proof that the occurrence was the result of anything other than the acts of Respondent's switching crew; that no outside force or agents intervened to any degree at all and none raised an issue, it is obvious the jury disregarded the undisputed evidence and its answer was contrary to the overwhelming weight and preponderance of the evidence as to be manifestly wrong and unjust. This Issue should not have been submitted, and attention is directed to Argument under Question IV for consideration of the unavoidable accident issue.

The proof showed negligence on the part of Respondent, which was not contradicted by Respondent by any competent testimony that had probative force. Long ago this Court established the rule that a court must, in relation to the jury, protect parties from unjust verdicts arising from ignorance of rules of law in evidence, from the impulse or passion or prejudice, or from any other violation of his lawful rights and in the conduct of trial. *Pleasants v. Fant*, 89 U.S. 116, 22 Wall. 116, 22 L.Ed. 780. Moreover, a jury is not to speculate. *Galloway v. United States*, (1943), 319 U.S. 372, 63 S.Ct. 1077, 87 L.Ed. 504, reh.

den'd, 320 U.S. 214, 63 S.Ct. 1443, 87 L.Ed. 851. Since the State appellate court did not remedy the abuse of Petitioner's rights by according Petitioner a proper appellate review based on testimony that had probative force, this Court is urged to take jurisdiction and correct the abuse. *Dick v. New York Life Ins. Co.*, (1959), 359 U.S. 437, 79 S.Ct. 921, 3 L.Ed.2d 935.

The case at bar is one where this Court should analyze the facts or by a re-examination of facts for determining whether the rules of federal law have been improperly applied to the facts, as this Court did, in *New York Times v. Sullivan*, 376 U.S. 254, 287, 84 S.Ct. 710, 729, 11 L.Ed. 2d 686, 95 A.L.R.2d 1412, mot. den'd 376 U.S. 967. Petitioner has been deprived of a fair trial in the State court, so that in effect, her federally created rights under the FELA have been taken away from her, as well as her right to a fair jury trial under the Seventh Amendment to the United States Constitution, Amend. VII, U. S. Const. Petitioner is the victim of an unjust verdict and judgment.

It is respectfully submitted that the jury's attention was distracted from appraisal of negligence issues by virtue of the "unavoidable accident" issue.

It is Petitioner's view, that if in reviewing the evidence, it is apparent fair-minded men with reason could reach the conclusion that employer fault played a part in producing the employee mishap Petitioner should be granted a new trial.

CONCLUSION

The questions presented in this Petition pertain to substantive law controlled by Federal law rather than State

law and has been decided in a way that is not in accord with applicable decisions of this Court. By the refusal to submit to the jury Petitioner's requested special issues (raised by the pleadings and evidence including a violation of Respondent's own safety rules), and the failure to properly instruct the jury as requested by Petitioner of the meaning of the term "reasonably safe place to work", Petitioner was deprived of a trial by jury based on her theories of recovery under the FELA. There can be no uniformity of decision in a FELA case brought in a Texas state court where under the Texas law practice and procedure casts the burden upon a plaintiff to negate, as part of plaintiff's case defendant's affirmative defense of "unavoidable accident", as well as the burden of proving negligence. How the submission of the "unavoidable accident" affects the jury in consideration of whether defendant's negligence played any part to cause the injury is impossible to measure where such issue is given by the trial court (over timely objection), and the jury finds the event was the result of "unavoidable accident" and also finds "no negligence". It is certain Respondent under the Act will claim the "unavoidable accident issue" is *immaterial*. The devastating harmful effect precluding a fair trial by the jury of the negligence issue or issues has thus been accomplished. This Court should abolish the affirmative defense of "unavoidable accident" as that defense is applied under Texas law practice and procedure in a FELA case. Petitioner was deprived of a fair trial because over timely objection of Petitioner, prejudicial evidence was permitted to come into evidence which obviously affected the burden of proof that Respondent's negligence played any part to cause injury to Mr. Hullum, as well as the presumption that he was exercising due

care for his own safety. For reasons stated, Petitioner has been deprived of her substantive Federally created rights under the FELA by local law, decisions and forms of local practice.

For the foregoing reasons Petitioner urges that the Petition for Writ of Certiorari be granted for this Court to review the record and the opinion of the Court of Civil Appeals for the Twelfth Supreme Judicial District of Texas, and reverse the judgments of the State courts and grant to Petitioner a new trial. Petitioner further prays for such other and further relief to which she may show herself justly entitled.

Respectfully submitted,

MAX GARRETT
1307 Sterling Building
Houston, Texas 77002

Original Signed By
MAX GARRETT

By _____
Member of the Bar of the
Supreme Court of the
United States

Of Counsel:

McLENDON & TYNER
Tyler, Texas

SCHMIDT & GARRETT
1307 Sterling Building
Houston, Texas 77002

MABEL GREY HOWELL
702 Sterling Building
Houston, Texas 77002

CERTIFICATE OF SERVICE

THE STATE OF TEXAS)
)
COUNTY OF HARRIS)

I, Max Garrett, one of the attorneys of record for the Petitioner, Mrs. Adelle Hullum, and a member of the Bar of the Supreme Court of the United States, depose and say that on the 21st day of August, 1965, I served triplicate copies of the foregoing Petition for Writ of Certiorari in the Supreme Court of the United States on Jack W. Flock, Esq. and Messrs. Ramey, Brelsford, Flock & Devreaux and Clyde W. Fiddes, Esq. and Messrs. Calhoun & Clark at their present address, Citizens First National Bank Building, Tyler, Texas, by depositing same in a United States Post Office in the City of Houston, Texas, with first class postage prepaid, via Certified Mail. Tyler, Texas is less than 500 miles from Houston, Texas.

Original Signed By
MAX GARRETT

SUBSCRIBED AND SWORN TO before the undersigned authority this 21st day of August, 1965.

/s/ Iris Morgan
Notary Public in and for
Harris County, Texas

APPENDIX "A"

MRS. ADELLE HULLUM, ADMINISTRATRIX,
ET AL., Appellants

No. 67 vs.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
Appellee

Appeal From The 114th Judicial District Court
Of Smith County, Texas

This suit was instituted by Adelle Hullum, Individually and as Temporary Administratrix of the estate of her deceased husband, J. T. Hullum, and also as Guardian of Richard Sidney Hullum and Cynthia Ann Hullum, seeking damages for the alleged wrongful death of J. T. Hullum under the Federal Employers' Liability Act, 45 U.S.C.A., Section 51, et seq. Upon trial of the cause, the jury returned a verdict for the defendant, St. Louis Southwestern Railway Company, and based upon the verdict the court entered a take-nothing judgment and the plaintiffs, hereinafter designated as Appellants, perfected this appeal.

As a basis for their cause of action, Appellants alleged in their pleadings that the injuries and resulting death sustained by the plaintiffs' decedent were caused by the failure on the part of the agents, servants and employees of the railroad to exercise due care for his safety in each of the following particulars: (1) in failing to furnish decedent with a safe place to work; (2) in failing to keep a proper lookout for decedent on the occasion in question; (3) in moving the cars at a speed in excess of that which an ordinary prudent person would have moved same; (4) in

kicking the cars in question harder than a person of ordinary prudence would have kicked same; (5) in kicking the cars without having first determined that decedent was in a safe position aboard the car he was riding; and (6) in kicking the cars in question on a downgrade, all of which acts were alleged to be a proximate cause of the injuries and resulting death of J. T. Hullum. Appellee St. Louis Southwestern Railway Company denied the allegations and plead contributory negligence and unavoidable accident.

The evidence shows that at the time of the accident Appellants' decedent, J. T. Hullum, was a member of a switching crew working at his assigned duties with Appellee St. Louis Southwestern Railway Company at Appellee's Tyler, Texas, yard. On the morning of December 13, 1961, the railroad's company crew was engaged in a switching operation which, in the railroad industry, is commonly referred to as "kicking cars," which was shown to be a customary type of operation. In this type of operation the switch engine would push a number of cars forward until enough momentum was gained that the cars would move under their own power, at which time the switch engine would be slowed and the cars would be "cut" or "kicked" loose from those remaining attached to the switch engine, and would then roll on to the different side track to their previously designated location where the cars would then be stopped or "spotted" by a member of the switching crew by the use of a handbrake. It was the duty of the decedent, J. T. Hullum, to ride the various "kicked" cars to their designated location and to set the handbrake at the proper "spot." Just before the occurrence in question, cars were being switched out of Track No. 6; one car had been kicked, unmanned to Track

11; one car had been kicked, unmanned to Track 8; one car had been kicked to Track 6, on which switchman C. R. Strother rode to apply the brake, and then six cars were kicked to Track No. 9 on which Hullum was to ride and set the brake.

According to the testimony of C. R. Strother, a member of the switching crew, he was looking directly at Hullum when the accident happened. He testified that he saw Hullum mount the rear end of the leading box car and again observed him when he got to the top of the car. He then observed Hullum to take about three or four steps forward and then turn around and face the engine, appearing to have braced himself. That although it is the usual practice in the Tyler yard for the engine to stop after a kick has been made, the engine did not stop on any of the previous kicks and did not stop before kicking the cars on which Hullum was riding. According to his testimony, the switch engine kicked the cars out from under Hullum and he fell down between the cars. He testified that immediately thereafter he left the car which he was riding and went upon one of the cars on which Hullum had been riding and applied the handbrake and stopped the cars; he then went to Hullum and found him to be underneath one of the cars, but outside the track; that he was approximately 55 to 60 feet from the place where he fell between the cars, was bleeding profusely and seemed to be injured in the shoulder and appeared to have been dragged by the cars. An ambulance was called and he was immediately hospitalized.

He further testified that at the point where Hullum fell from the car, the grade of the track decended in the direction in which the cars were moving, and that under

such circumstances it is not ordinarily necessary to kick the cars because they will move under their own momentum; that it was the usual custom in the Tyler yard for the engine to kick the cars and then stop before kicking other cars, but on this occasion the switch engine did not stop before kicking the cars upon which Hullum was standing. However, the kick was accomplished in an ordinary manner and there was no rule or regulation requiring the engine to stop before kicking. According to his testimony, it is the duty of the engine foreman to see that his men are in a safe position before kicking movements are made.

L. C. Foster, another member of the switching crew, testified that he had pulled the pin to cut loose the six cars on which Hullum was riding, and there remained eleven cars between him and the switch engine at that time. He testified that the side tracks were so arranged that it was not necessary for the switch engine to stop in order to make the previous kicks on the side track, but same could be accomplished by bumping or kicking the cars and then slowing down; that this was the method used on this occasion; that Mr. W. B. Bradley gave the kick signal at which time the cars were traveling three or four miles an hour; that he did not know the whereabouts of Hullum at that time and did not see him fall.

The engineer, C. H. Bivins, testified that at the time of the incident the switch engine was proceeding between three and four miles an hour on a decending grade; that upon receiving the kick signal from Bradley, he momentarily accelerated the throttle so that the sudden thrust of power from the engine would bump the cars together so that the tension on the pin connecting the coupling be-

tween the cars could be released, permitting the pin to be pulled so that the cars could be uncoupled as they moved down the track; that the momentary acceleration of the throttle would have probably increased the speed of the engine to seven or eight miles per hour had the acceleration been maintained. He testified that he did not see Hullum at the time of the kick signal nor at any time thereafter. He further testified that the kicking operations on this occasion were made without stopping; that there was no rule requiring the engine to stop before a kicking operation, and that it is safer on a downgrade track to move the cars in and spot them while attached to the engine rather than kick them.

The engine foreman, W. B. Bradley, testified that he was the foreman in charge of the switching crew, and that he was responsible for the safety of the equipment as well as the safety of the men. It was his duty to give the engine all signals in connection with the switching operation; that he had given the engineer the signal to kick the cars on which Hullum was riding; that on this occasion it was necessary to kick the cars somewhat harder than usual because of the fact that in cold weather the cars will not roll as freely as in warm weather, but that the cars on the occasion in question did not exceed a speed of between four and six miles per hour. He testified that at the time the signal was given he did not have Hullum in his view because Hullum had crossed over the track ahead of the cars in order to align the switch and was, therefore, on the opposite side of the train from him; that he did not see Hullum when he reached the top of the car because of the fact that he was standing on the ground near the cars and could not, therefore, see on top of the cars. He further

testified that although it was not the custom in the Tyler yards to bring the train to a complete stop before a kicking movement was made, it was done most of the time when such movement was made on a downgrade; that it was his duty to see that the men were in a safe position before a car was kicked, and that although there was nothing unusual about the kicking operation, it would have been safer to have shoved the cars to the desired location rather than to have kicked them.

The hospital records introduced by Appellants from the files of the St. Louis Southwestern Railway Lines Hospital where Mr. Hullum was treated contains a history of the injury related by Mr. Hullum upon his arrival there on December 22, 1961. The history related by him was as follows:

> "Present Illness: The patient gives a history of injury on December 13, 1961, in the Tyler Yards. He was on top of a car (moving) trying to get from that car to the next. Then lost his balance. Fell between the 2 cars on the ground and apparently he was dragged for some distance before the cars came to a stop. Multiple injuries resulted."

The medical testimony shows conclusively that death resulted from the injuries sustained by him on the occasion in question.

In response to the Special Issues submitted by the court, the jury found (1) that the members of the defendant's switching crew did not fail to keep a proper lookout for decedent on the occasion in question; (2) that the defendant's switching crew immediately before the occur-

rence did not move the car they were switching at a speed in excess of that at which a person of ordinary prudence in the exercise of ordinary care would have moved the cars under the same or similar circumstances; (3) that the kicking of the cars on the occasion in question was not negligence; (4) that the cars were not kicked harder than they would have been kicked by an ordinary prudent person in the exercise of ordinary care; (5) that the defendant did not fail to provide J. T. Hullum with a reasonably safe place in which to work; (6) that the death of J. T. Hullum was not due solely to natural causes; (7) that such injuries were a producing cause of his death; and (8) that the occurrence in question was the result of an unavoidable accident. The jury exonerated deceased, J. T. Hullum, of any contributory negligence and assessed the damages due his estate at $10,000.00 for his mental pain and suffering and loss of earnings; assessed the damages of each of the minor children at the sum and amount of $20,000.00, and assessed the damages to Mrs. Adelle Hullum, his wife, at $42,500.00.

Appellants contend by their first two Points that the trial court committed reversible error in failing to submit to the jury their requested Special Issues No. 1A and 3A, followed by the subsidiary issues of negligence and proximate cause.

Omitting the subsidiary issue of proximate cause, the first requested issue read as follows:

> 1-A "Do you find from a preponderance of the evidence that kicking of the cars on the occasion in question on a down grade was negligence?"

The court, no doubt, refused this issue because the court in his main charge had already submitted Special Issue No. 5 as follows:

> "Do you find from a preponderance of the evidence that the kicking of the cars on the occasion in question was negligence?"

Thus, the only difference in the issue submitted and the one requested is that the phrase "on a down grade" was inserted. It was not disputed that the track at the point of the kicking operation was on a downgrade. All the witnesses testified that the track was on a slight downgrade and there is nothing in the record that would indicate the contrary. Quite obviously, Special Issue No. 5 was a much broader submission than that requested by the Appellants. It covered every aspect of negligence in the kicking operation and is a controlling issue, while the issue requested by Appellants would limit the inquiry as to whether or not it was negligence to kick the cars while on a downgrade and would, therefore, amount to nothing more than an evidentiary issue.

It is our opinion that the issue suggested by the Appellants is but another shade or phase of the same issues which had therefore been substantial and sufficiently covered by Special Issue No. 5 in the court's main charge.

> "* * * It has never been the policy of the law to lengthen and complicate special issue charges by requiring trial courts to give issues that merely submit various phases or other shades of meaning of an issue already in the charge. It is required only that each controlling issue raised by the pleadings and the evidence be submitted once, fairly, simply and suc-

cinctly." Northeast Texas Motor Lines, Inc. v. Hodges, 138 Tex. 280, 158 S.W.2d 487; Little Rock Furniture Mfg. Co. v. Dunn, 148 Tex. 197, 222 S.W.2d 985, Rule 279, T.R.C.P. We fail to find any error in the court's refusal to submit Appellants' requested Issue 1A.

With reference to Appellants' requested Issue No. 3A, omitting the subsidiary issues of negligence and proximate cause, the requested Special Issue reads as follows:

> 3-A "Do you find from a preponderance of the evidence that the Defendant's crew on the occasion in question kicked the cars in question without first determining that J. T. Hullum was in a safe position aboard the car he was riding?"

Appellants contend that even though the court submitted other Special Issues covering (1) whether or not Appellee's crew kept a proper lookout; (2) whether Appellee furnished a safe place to work; and (3) whether or not the kicking of the cars on the occasion in question was negligence, the trial court erred in failing to submit this issue because this issue having been plead, presented another theory of recovery.

Appellants argue that since the engine foreman Bradley had a duty to know that his men were in a safe place before kicking the cars, and since he could not see Hullum from the position he occupied on the ground, even though he maintained a proper lookout from his position on the ground, Bradley failed to perform his duty in that he failed to determine that Hullum was in a safe position before commencing the kicking operation, which conduct presented an independent controlling issue on an additional theory of recovery.

What has heretofore been said with regard to the propriety of submitting Appellants' Specially Requested Special Issue No. 1A would appear to apply with equal force to this requested issue. It was Appellants' theory that the conduct of the switching crew in kicking the cars at the time, place and on the occasion under all the surrounding circumstances amounted to negligence. It therefore appears to us that the submission of Special Issue No. 1 inquiring as to whether the other members of the Appellee's switching crew kept such a lookout for Hullum as would have been kept by an ordinary prudent person in the exercise of ordinary care under the same or similar circumstances, together with the submission of Special Issue No. 5 inquiring as to whether the train crew failed to use ordinary care in kicking the cars on the occasion in question would be sufficient to cover the controlling issue raised by the pleadings and evidence. It appears to us that these two issues would fairly and adequately cover every aspect of any negligence that could have possibly been involved in the kicking operation.

Where the controlling issues raised by the pleadings and evidence have been fairly, simply and succinctly submitted, a reversal cannot be predicated upon the trial court's failure to submit other and various phases or different shades of the same issue. Moreover, it is reversible error for the court to submit the same controlling fact question more than once, whether in identical language or merely in similar form. Western Gulf Petroleum Corporation v. Frazier Jelke & Co., 163 S.W.2d 860; Clary v. Morgan Motor Co., 246 S.W.2d 936; Texas & N.O.R. Co. v. Pool, 263 S.W. 2d 582, Rule 279, T.R.C.P.

Appellants contend that the failure to submit these issues would amount to a denial of Appellants' "federally created rights" under the provision of the Federal Employers' Liability Act. This would, no doubt, be true if the Requested Issue presented an ultimate, controlling fact issue not already covered in the charge of the court, because the denial of such an issue would be to deny a substantive right. If, however, we are correct in holding that the trial court submitted all of the controlling fact issues made by the pleadings and the evidence, it appears to us that the Appellants were thereby afforded all substantive rights, in this respect, contemplated by the Act and the decisions of the federal courts. The question of whether the issues are to be further "pulverized" can be nothing more than a procedural question to be determined according to the procedural rules of the forum selected by the Appellants. Thompson v. Robbins, 157 Tex. 463, 304 S.W.2d 111; Dollie Adams Oil Corp. v. Cree, Tex. Civ. App., 279 S.W.2d 619. Appellants' Points 1 and 2 are overruled.

By Appellants' third Point, it is contended that the trial court committed reversible error in failing to submit Appellants' Specially Requested Instruction No. 2 as follows:

> "You are further instructed that the Defendant railroad is under a continuing non-delegable duty to provide its employees including the Plaintiffs' decedent, J. T. Hullum, with a reasonably safe place in which to work."

The charge of the court contained an issue inquiring as to whether or not Appellee furnished a safe place to work,

together with a definition of the terms used therein,[1] Appellants registered no objection to the issue nor to the definition of the term "safe place to work", but requested in addition thereto the above instruction.

Rule 277, T.R.C.P., provides in part as follows:

> "In submitting Special Issues, the Court shall submit such explanatory instructions and such definitions of legal terms as shall be *necessary* to enable the jury to properly pass upon and render a verdict on such issues. * * * " (Emphasis added)

Instructions in the nature of a general charge are exceptional and as indicated by the Rule are to be given only when a necessity exists therefor. Boaz v. White's Auto Stores, 141 Tex. 366, 172 S.W. 2d 481; Archey v. Nederlandsch-Amerikaansche Stoom. Maat., 354 S.W. 2d 688, cert. den., 9 Law Ed. 2d 236, 371 U.S. 929.

We fail to see how the knowledge on the part of the jury of the legal obligation of the railroad company's continuing non-delegable duty would, under the circumstances, have aided the jury in determining from the facts before it whether the railroad company had failed to furnish a safe place to work. We think the court's definition of the term "reasonably safe place to work" was a correct

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[1] SPECIAL ISSUE NO. 9

"Do you find from a preponderance of the evidence that on the occasion in question, December 13, 1961, the defendant failed to provide J. T. Hullum, deceased, with a reasonably safe place in which to work?

"You are instructed that by the term 'reasonably safe place in which to work', as used herein, is meant such a place with regard to safety of its employees as would be furnished by an ordinary prudent employer in the exercise of ordinary care under the same or similar circumstances."

definition and was adequate under the circumstances presented here. Guthrie v. Sinclair Refining Company, Tex.Civ. App., 320 S.W.2d 396, n.r.e., cert.den. 4 Law Ed. 2d 120.

If, however, the refusal by the court to submit the Requested Instruction be deemed to be error, we have concluded that such would not amount to such a denial of the right of the Appellee as to be reasonably calculated to cause, and probably did cause, the rendition of an improper judgment. Rule 434 and 503, T.R.C.P., Thompson v. Robbins, supra.

Point 5 complains of the action of the action of the trial court in admitting testimony of W. B. Bradley, Appellee's engine foreman, concerning a conversation with the decedent while visiting with decedent in the hospital in Tyler. That portion of the conversation to which objection was made is as follows:

> "Q. Did he (J. T. Hullum) tell you anything about what had happened?
>
> "A. No, sir. Other than he said he didn't hold any member of the crew responsible or feel any ill feeling toward any member of the crew about the accident."

Appellants objected to the admission of this testimony on the grounds that it was a self serving declaration, hearsay and a conclusion. The objection was overruled.

As a general rule, declarations, statements, or admissions against interest are admissible in civil cases against the party making them. This rule is a well recognized exception to the hearsay rule. It has also been held that such statements by an ancestor against his interest which would be admissible against him if living are admissible against his heirs and legal representatives of his estate. McLean v. Hargrove,

139 Tex. 236, 162 S.W.2d 954; Hupp v. Hupp., Tex. Civ. App., 235 S.W.2d 753; Lubbering v. Ellison, Tex. Civ. App., 342 S.W.2d 796; 24 Tex. Jur. 2d, Par. 613, p. 166.

We are likewise unable to agree with Appellants' contention that such testimony was objectionable as a conclusion. The opinion or conclusion rule is considered to be applicable only in regulating the examination of a witness on the witness stand, where under the supervision of the court, the witness can be required to give the specific facts and is not thought to apply to an out-of-court statement, declaration or admission. In light of the facts and circumstances presented here, we are inclined to believe decedent's statement that he did not hold any member of the crew responsible for the accident was admissible before the jury in the words of the declarant, even though it be considered a conclusion. Farrand v. Houston & T.C.R. Co., Tex. Civ. App., 205 S.W. 845; Taylor v. Owen, Tex. Civ. App., 290 S.W.2d 771; McCormick & Ray, Texas Law of Evidence, Par. 1126, p. 23. Appellants' fifth Point is thought to be without merit.

The sixth Point complains of the action of the trial court in admitting into evidence, over Appellants' objection, a motion picture depicting the "kicking" movement of the train, contending that the film should not have been shown to the jury because the surrounding conditions, type of cars, the position of the crew and the speed of the movement as depicted by the picture was different from that on the occasion in question, thereby rendering such motion picture immaterial and highly prejudicial.

In order to render evidence of an experiment made out of court admissible, it is generally held that there must be

a substantial similarity between conditions existing at the time of the occurrence which gives rise to the litigation and those in existence at the time the experiment is conducted for demonstration purposes. It, is not, however, essential that the conditions of the occurrence and the experiment be identical. When there exists a dissimilarity, testimony of an experiment should be excluded when the result thereof would probably confuse rather than aid the jury. There exists, however, an area wherein the determination of the admissibility of proffered experiment testimony rests within the discretion of the trial judge. This occurs whenever the dissimilarity between the occurrence, conditions and the circumstances of the experiment is minor or can be made abundantly clear by explanation. Fort Worth & Denver Railway Company v. Williams, Tex. , 375 S.W.2d 279.

It is conceded that the film does not attempt to re-enact the fatal accident.

Appellants contend that the demonstration depicted by the motion picture should have not been admitted in evidence because the movement was not shown to be similar to the actual occurrence in question in that the engine crew was not the same; the crew was not in the same position; the engine was not the same; the weather was much warmer; that no one was shown to be on top of the car in Hullum's position at the time the "kick" was made; that there were four gondola cars in front of the boxcar rather than boxcars, so that a man at the brake platform could be more easily seen; that the cars were moved more slowly; that the gondola cars used in the film were loaded, which would cause them to roll faster than empty cars, and that there was no bumping of the cars—they were merely cut off.

Appellee's engine foreman, W. B. Bradley, who was in charge of the switching operation on the occasion of Mr. Hullum's injury was also in charge of the switching operation at the time of the making of the film. He testified that except for himself, the engine crew used on the occasion of the film was not the same, nor was the same engine used; that the weather was much warmer; that no one rode on the boxcar in Hullum's position atop the boxcar. He further testified that in making the film, no attempt was made to do anything except to show the type of switching movement; that the film was shown to him after it had been developed and that the film was a correct portrayal, substantially, of the type of switching operation that was conducted on the date of the accident, and that it showed the same portion of the track where the accident occurred and that the speed of the movement was the same.

It is apparent from the record that the Appellee's purpose in offering the film was to demonstrate only the movement of the train while engaged in a "kicking" operation.

The trial court ruled that the exhibition of the film to the jury would not confuse them, but would be of some aid to them and that the dissimilarities disclosed had either been explained or were capable of explanation so as to be readily understood. It occurs to us that the situation presented here falls within that area where the determination of the admissibility of the proffered experiment testimony rests within the sound discretion of the trial judge. Very few tests can be made under the exact conditions present when a prior event occurred. The law requires only that substantially the same conditions must exist. The trial court is allowed considerable latitude in determining whether

the conditions are sufficiently similar to permit testimony about the tests. Fort Worth and Denver Railway Co. v. Williams, supra; Howell v. Missouri-Kansas-Texas Railroad Company, (Tex.Civ.App.), 1964, 380 S.W.2d 842; Morris v. Du Pont De Nemours & Co., 139 S.W.2d 984, (S.Ct. Mo).; McCormick & Ray, Texas Law of Evidence, Vol. 2, page 322. No abuse of discretion is thought to be shown and the point is therefore overruled.

By Points 7 through 14 Appellants contend that the judgment should be reversed because the findings of the jury in response to each of the Special Issues is contrary to the evidence and is so against the overwhelming weight and preponderance of the evidence as to be manifestly wrong and unjust.

In approaching the problem presented by these assignments, we must keep in mind that we are here dealing with a cause of action created by our National Congress and jealously interpreted by the federal courts. The fact that the case was tried in a Texas court according to our local rules of procedure means little, if anything, when we come to decide the sufficiency of the evidence. Under the Federal Employers' Liability Act, the question of "what constitutes negligence, and sufficiency of evidence to raise that question for the jury, is to be determined by the applicable federal decisions." Port Terminal Railroad Association v. Ross, 155 Tex. 447, 289 S.W.2d 220.

Under the most recent federal decisions, the function of the jury in F.E.L.A. cases has been broadened to the extent that very little evidence is required to uphold a jury verdict of negligence. Rogers v. Missouri Pacific Railroad Co., 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed. 493; Lavender v. Kurn, 327 U.S. 645, 66 S.Ct. 740, 90 L.Ed. 916; Deen v.

Gulf, Colorado & Santa Fe Railway Co., 353 U.S. 925, 77 S.Ct. 715, 1 L.Ed.2d 721; Gallick v. Baltimore and Ohio Railroad Company, 372 U.S. 108, 83 S.Ct. 659; Basham v. Pennsylvania Railroad Company, 372 U.S. 699, 83 S.Ct. 965.

A review of the Federal decisions makes it clear that it is the federal policy to give the jury a much wider latitude than is customary under the state law standards established by our own Supreme Court. In the Rogers case, supra, it is there pointed out that it was the "basic congressional intention to leave to the fact-finding function of the jury the decision of the primary question raised in these cases—whether employer's fault played any part in the employees' mishap." And the Supreme Court then reaffirmed this position by saying it was "cognizant of the duties to effectuate the intention of Congress to secure the right to a jury determination (in FELA cases), (and) this court is vigilant to exercise its power of review in any case where it appears that the *litigants* have been improperly deprived of that determination." (Emphasis supplied). This decision is thought to be applicable to the right of the employer as well as to the right of the employee. Certiorari was denied in each of the following cases where the employee sought to overturn an adverse jury verdict. Jones v. Illinois Term. R.R., 347 U.S. 956; Conser v. Atchison, T. & Atchison, T. & SF R.R., 348 U.S. 828; Metrakos v. Cleveland Union Term. Co., 348 U.S. 872; Kane v. Chicago, B & Q R.R., 348 U.S. 943; Daulton v. Southern Pac. Co., 352 U.S. 1005; Burch v. Reading & Co., 353 U.S. 965; Brinkley v. Penn R.R., 358 U.S. 865; and Masterson v. New York Cent. R.R., 361 U.S. 832.

In Tennant v. Peoria & P U R.R., 321 U.S. 29, 35, 64 S.Ct. 409, the Supreme Court in a F.E.L.A. case said:

> "Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

That the applicable rules of state law on the question of the insufficiency of evidence do not apply to federally created rights has been foreclosed in this state by the decision of Deen v. Hickman, 358 U.S. 57.

In the Deen case the Supreme Court of the United States held, in effect, that in reviewing evidence in FELA cases the Texas standard of "against the great weight and preponderance of the evidence" is not applicable, and that reversal of a verdict of a jury on this ground is, as a matter of law, improper. The sequence of events giving rise to this opinion is significant. Initially the Texas courts disregarded a jury verdict in favor of an employee on the ground that there was "no evidence" of negligence. When this decision was reviewed by the United States Supreme Court at 353 U.S. 925, the case was reversed and remanded to the Texas Supreme Court. That court then returned the case to the Court of Civil Appeals for an independent determination of whether the answers of the jury were "against the great weight and overwhelming preponderance of the evidence." This action of the Texas Supreme Court was again appealed, and the United States Supreme Court again reversed, holding that an inquiry as to whether the verdict of the jury was against

the great weight and preponderance of the evidence was "foreclosed."

The federal standards in evaluating jury verdicts in FELA cases have thus been compelled by the Supreme Court of the United States and the validity of those standards has been recognized by the Supreme Court of Texas. Robinson v. Gulf, Colorado & Santa Fe Ry. Co., (1959), 325 S.W.2d 432, err. ref., cert., 80 Sup.Ct. 672, 362 U.S. 919, 4 Law Ed.2d 739.

For the above reasons it appears that Points 7 through 14 are immaterial.

We hasten to add, however, that we have had occasion to review all of the evidence in the case and have concluded that the findings of the jury are not so against the weight and preponderance of the evidence as to be manifestly wrong and unjust.

No reversable error being shown, it becomes the duty of this court to affirm the judgment of the trial court and it is so ordered.

JAMES H. MOORE
Associate Justice

November 5, 1964
Filed November 5, 1964

APPENDIX "B"

BE IT REMEMBERED:

THAT the Honorable Court of Civil Appeals for the Twelfth Supreme Judicial District of the State of Texas, present Chief Justice Otis T. Dunagan, and Associate Justices James H. Moore and Grover Sellers, in Cause

No. 67

MRS. ADELLE HULLUM, ADMINISTRATRIX, ET AL.

vs.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Appellee

Trial Court No. 62-28

on November 5, 1964, entered the following judgment:

THIS CAUSE came on to be heard on the transcript of the record; and the same being inspected, it is the opinion of the Court that there was no error in the judgment.

It is therefore CONSIDERED, ADJUDGED and ORDERED that the judgment of the court below be in all things affirmed; that the appellee, St. Louis Southwestern Railway Company, recover of and from the appellants, Mrs. Adelle Hullum, Individually and as Guardian of Richard Sidney Hullum, and Cynthia Ann Hullum, minors, and from J. W. Tyner and H. Clyde McLendon, sureties on appellants' appeal bond, all costs in this behalf expended, both in this court and the court below, for all of which execution may issue; and that this decision be certified to the court below for observance.

APPENDIX "C"

Motion Docket No. 189: December 3, 1964.

ORDER

Appellant's Motion for Rehearing.

Motion is submitted and overruled.

APPENDIX "D"

And on July 8, 1965, entered the following order: Motion Docket No. 304:

THIS DAY came on to be heard Appellant's Motion to Stay Enforcement of Judgment for Costs Pending Applacation for a Writ of Certiorari to the Supreme Court of the United States; and the same being considered, it is the opinion of the Court that the motion should be granted.

It is therefore ORDERED, ADJUDGED and DECREED that the enforcement of the judgment for costs in Cause No. 62-28, District Court of Smith County, against the appellant, Adelle Hullum, Administratrix, by the Honorable Philip L. Dibert, District Clerk of Smith County, Texas, be stayed pending the time allowed for filing of a Petition for Writ of Certorari to the Supreme Court of the United States and the final disposition thereof.

APPENDIX "D-1"

ORDER

And on July 13, 1965, entered the following order:

The Clerk of the Court of Civil Appeals for the 12th Supreme Judicial District of Texas, at Tyler, is directed to deliver to Miss Mabel G. Howell, Attorney for Apellant, Mrs. Adelle Hullum, the record in Cause No. 67, styled Mrs. Adelle Hullum, Administratrix, Appellant, vs. St. Louis Southwestern Railway Company, Appellee, for transmittal to the United States Supreme Court, taking Miss Howell's receipt therefor.

/s/ OTIS T. DUNAGAN, Chief Justice
OTIS T. DUNAGAN

APPENDIX "E"

IN THE SUPREME COURT OF TEXAS

No. A-10,550 April 7, 1965

MRS. ADELLE HULLUM, ET AL.,

vs.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

From Smith County, Twelfth District

Application of petitioners for writ of error to the Court of Civil Appeals for the Twelfth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring

reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicants, Mrs. Adelle Hullum, Individually and as Guardian of Richard Sidney Hullum and Cynthia Ann Hullum, minors, and sureties, J. W. Tyner and H. Clyde McLendon, pay all costs incurred on this application.

APPENDIX "F"

No. A-10,550 May 26, 1965

MRS. ADELLE HULLUM, ET AL.,

vs.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,

From Smith County, Twelfth District

Petitioners' motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

APPENDIX "G"

No. 62-28

MRS. ADELLE HULLUM, ADM., ET AL.;
vs.
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,

In the District Court of Smith County, Texas,
114 Judicial District

JUDGMENT

BE IT REMEMBERED that on the 7th day of October, 1963, came on for trial the above entitled and numbered cause wherein MRS. ADELLE HULLUM, as duly qualified and acting Administratrix of the Estate of J. T. HULLUM, Deceased, in her representative capacity, and ADELLE HULLUM, Individually and as the duly qualified and acting Guardian of the persons and estates of RICHARD SIDNEY HULLUM, a minor, and CYNTHIA ANN HULLUM, a minor, and as Next Friend for said Minors, and MRS. IVIE HULLUM, are Plaintiffs and ST. LOUIS SOUTHWESTERN RAILWAY COMPANY and ST. LOUIS SOUTHWESTERN RAILWAY LINES are Defendants, and came the Plaintiffs in person and by and through their attorneys of record and also came the Defendants by and through their attorneys of record; and came the Defendants urging their Motion to Dismiss this action as to MRS. IVIE HULLUM, and the Court, having duly heard and considered the same, is of the opinion that such Motion to Dismiss should be and the same is hereby sustained and this cause, as to MRS. IVIE HULLUM, is hereby DISMISSED, without preju-

dice; and thereupon, all parties announced ready for trial, whereupon a jury was duly selected, impaneled and sworn and, having heard the pleadings and the evidence, the Court's Charge was read to the jury and after argument of counsel, the jury retired on the 11th day of October, 1963, and elected J. W. BRITTON as its Foreman, deliberated upon the Court's Charge and, in response to the Special Issues, definitions, and explanatory instructions, submitted to them by the Court, made the following respective findings:

Special Issue No. 1: "We do not."
Special Issue No. 2: Unanswered
Special Issue No. 3: "We do not."
Special Issue No. 4: Unanswered
Special Issue No. 5: "We do not."
Sepcial Issue No. 6: Unanswered
Special Issue No. 7: "We do not."
Special Issue No. 8: Unanswered
Special Issue No. 9: "We do not."
Special Issue No. 10: Unanswered
Special Issue No. 11: "It was not due solely to natural causes."
Special Issue No. 12: "They were a producing cause."
Special Issue No. 13: "We do not."
Special Issue No. 14: Unanswered
Special Issue No. 15: "We do not."
Special Issue No. 16: Unanswered
Special Issue No. 17: Unanswered
Special Issue No. 18: "We do not."
Special Issue No. 19: Unanswered
Special Issue No. 20: "It was the result of an unavoidable accident."

Special Issue No. 21: "$10,000.00"
Special Issue No. 22: "$20,000.00"
Special Issue No. 23: "$20,000.00"
Special Issue No. 24: "$42,500.00"
Special Issue No. 25: "None."

which findings and answers to all of the issues were received by the Court and were filed and entered of record; whereupon, the defendants having made and the Court having duly heard and considered a Motion for Judgment, and the Court being of the opinion, based upon the evidence, the verdict of the jury, and the law, that Judgment should be rendered on the verdict in favor of the Defendants;

It is accordingly ORDERED, ADJUDGED and DECREED by the Court that Plaintiffs, MRS. ADELLE HULLUM, as Administratrix of the Estate of J. T. HULLUM, Deceased, in her representative capacity, and ADELLE HULLUM, Individually and as the Guardian of the persons and estates RICHARD SIDNEY HULLUM, a minor, and CYNTHIA ANN HULLUM, a minor, and as Next Friend for said Minors, and each of them, take nothing by reason of this suit of and from the Defendants, ST. LOUIS SOUTHWESTERN RAILWAY COMPANY and ST. LOUIS SOUTHWESTERN RAILWAY LINES, or either of them.

It is further ORDERED, ADJUDGED and DECREED that any relief sought herein by the parties, unless expressly granted herein, is hereby denied.

All costs of Court are hereby taxed against the Plaintiffs,

jointly and severally, for which let execution issue if not timely paid.

SIGNED and ENTERED this the 16th day of October, A. D. 1963.

/s/ CONNALLY McKAY
Judge Presiding

APPROVED AS TO FORM ONLY:

/s/ J. W. Tyner
ATTORNEYS FOR PLAINTIFFS

APPENDIX "H"

STATE COURTS; APPEAL; CERTIORARI

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority, exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929; 28 U.S. Code, Sec. 1257.

APPENDIX "I"

FEDERAL EMPLOYERS' LIABILITY ACT

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, Sec. 1, 35 Stat. 65; Aug. 11, 1939, c. 685, Sec. 1, 53 Stat. 1404; 45 U. S. Code, Sec. 51.

APPENDIX "J"

NO. 62-28

IN THE
DISTRICT COUURT OF SMITH COUNTY, TEXAS
114th JUDICIAL DISTRICT

MRS. ADELLE HULLUM, ADMINISTRATRIX
vs.
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,

COURT'S CHARGE AND JURY VERDICT

MEMBERS OF THE JURY:

This case will be submitted to you on special issues, or questions, which you are called upon to answer. Your verdict will consist of your answers to the special issues. In your deliberations on a verdict and in arriving at your answers to the special issues you must observe the following rules. A failure on your part to observe these rules may result in a waste of your time and of the time of the Court and in hindering and delaying the administration of justice.

1. All special issues, or questions, are to be answered by you from the preponderance of the evidence. By this is meant the greater weight and degree of credible evidence before you. In passing on and weighing the evidence, you are the judges of the credibility of the witnesses and of the weight to be given to their testimony.

2. In answering the special issues you are not to consider or discuss the effect your answers may have on the judg-

ment to be rendered in the case. You are to answer the questions truly, as you find the facts to be from the evidence before you without regard to what the effect may be on the judgment to be rendered. When you have answered the questions truly, the Court will undertake to render the proper judgment. You are not to decide who you think should prevail in the lawsuit and then undertake to answer the questions so as to bring about that result, Your sole duty and responsibility is to answer the special issues truly, regardless of whom those answers favor or do not favor.

3. The answers to all the special issues must be agreed to by all of the jurors, after discussing and considering the evidence bearing on such issue. There cannot be any majority answers. Each issue must be answered by unanimous vote of the Jurors.

4. In considering your answers to the special issues you must confine your dicussion and deliberations to the evidence introduced in the trial of the cause, admitted by the Court, and not withdrawn from your consideration and to legitimate inferences from such evidence. You must not make reference to or discuss any outside matters not raised by the evidence before you. Either those are matters that are immaterial or they will be taken care of by the Court, and you are not concerned with them. So you will leave all such outside matters out of your discussions and consideration. In particular if any of you have personal knowledge of any matter that might have any bearing on the case, or that you may think has any bearing on the case, not based on the evidence introduced during the trial, you are not to relate the same to the other members of the jury, and you are not to take the same into con-

sideration in arriving at your answers to the special issues. You are to confine yourselves solely to answering the questions propounded to you and your answers must be based solely on the evidence introduced during the trial, admitted by the Court, and not withdrawn from your consideration, and on legitimate inferences therefrom, and not on any personal knowledge or experience of the jury, or any member thereof, outside this trial.

5. You are not to render any quotient verdict. That is, in arriving at any monetary award of damages you may allow, if any, you are not to arrive at said amount by having each juror set down the amount he thinks should be allowed, adding up the total, and then dividing the number by twelve, the number of jurors; nor are you to arrive at any such sum, if any, in any other manner than by a discussion of the evidence bearing thereon.

Your verdict will not be based on sympathy, prejudice, or any other improper emotion or motive.

6. It becomes proper to define or state to you the meaning of certain terms and expressions that will be used in this charge, and in answering the special issues you will keep the meaning of such terms and expressions in mind.

(a) *Ordinary Care*. The term "ordinary care", as used in law, means such care as a person of ordinary prudence would use under the same or similar circumstances.

(b) *Negligence*. A failure to use ordinary care is termed "negligence". "Negligence" may be further defined as doing that which a person of ordinary prudence would not do under the same or similar circumstances, or a failure

to do what a person of ordinary prudence would do under the same or similar circumstances.

(c) *Proximate Cause.* The term "proximate cause", as used in law, means that cause which in a natural and continuous sequence produces the injury, and without which the injury would not have occurred, and from which it ought to have been foreseen or reasonably anticipated by a person in the exercise of ordinary care that the injuries complained of, or some similar injury, would result naturally and probably in the light of the attending circumstances. There may be more than one proximate cause of an event.

If other definitions are needed, they will be given later on in this charge.

You are instructed that any fact before you may be established by circumstantial evidence, or direct evidence, or both. A fact may be established by direct evidence when proved by witnesses who saw that acts were done or omitted, or saw the conditions in question, or heard the words spoken, or by documentary evidence. A fact may be established by circumstantial evidence when existence of it is fairly and reasonably inferred from other facts proved in the case. [Tr. 37, cont'd with Sp. Issues, App. K.]

APPENDIX "K"

SPECIAL ISSUES AND VERDICT OF JURY

SPECIAL ISSUE NO. 1

Do you find from a preponderance of the evidence that the other members of the Defendant's switching crew failed to keep a proper lookout for J. T. Hullum on the occasion in question?

Answer: "We do" or "We do not".

Answer: We do not.

By the term "proper lookout", as used herein is meant such a lookout as would have been kept by an ordinary prudent person in the exercise of ordinary care under the same or similar circumstances.

If you have answered Special Issue No. 1 "we do", and only in that event, then answer:

SPECIAL ISSUE NO. 2

Do you find from a preponderance of the evidence that such failure, if any, was a proximate cause in whole or in part of the injuries received by J. T. Hullum on the occasion in question?

Answer: "We do" or "We do not".

Answer:

SPECIAL ISSUE NO. 3

Do you find from a preponderance of the evidence that the Defendant's switching crew immediately before the

occurrence in question, moved the cars they were switching at a speed in excess of that at which a person of ordinary prudence in the exercise of ordinary care would have moved the cars under the same or similar circumstances?

Answer: "We do" or "We do not".

Answer: We do not.

If you have answered Special Issue No. 3 "we do" and only in that event, then answer:

SPECIAL ISSUE NO. 4

Do you find from a preponderance of the evidence that such action, if any, was a proximate cause, in whole or in part, of the injuries received by J. T. Hullum on the occasion in question?

Answer: "We do" or "We do not".

Answer:

SPECIAL ISSUE NO. 5

Do you find from a preponderance of the evidence that the kicking of the cars on the occasion in question was negligence?

Answer: "We do" or "We do not".

Answer: We do not.

If you have answered Special Issue No. 5 "we do" and only in that event, then answer:

SPECIAL ISSUE NO. 6

Do you find from a preponderance of the evidence that such negligence, if any, was a proximate cause, in whole or in part, of the injuries received by J. T. Hullum on the occasion in question?

Answer: "We do" or "We do not".

Answer:

SPECIAL ISSUE NO. 7

Do you find from a preponderance of the evidence that on the occasion in question the cars in question were kicked harder than they would have been kicked by an ordinary prudent person in the exercise of ordinary care under the same or similar circumstances?

Answer: "We do" or "We do not".

Answer: We do not.

If you have answered Special Issue No. 7 "we do", and only in that event, then answer:

SPECIAL ISSUE NO. 8

Do you find from a preponderance of the evidence that such action, if any, was a proximate cause in whole or in part of the injuries received by J. T. Hullum on the occasion in question?

Answer: "We do" or "We do not".

Answer:

SPECIAL ISSUE NO. 9

Do you find from a preponderance of the evidence that on the occasion in question, December 13, 1961, the defendant failed to provide J. T. Hullum, deceased, with a reasonably safe place in which to work?

Answer: "We do" or "We do not".

Answer: We do not.

You are instructed that by the term "reasonably safe place in which to work", as used herein, is meant such a place with regard to safety of its employees as would be furnished by an ordinary prudent employer in the exercise of ordinary care under the same or similar circumstances.

If you have answered Special Issue No. 9 "we do", and only in that event, then answer:

SPECIAL ISSUE NO. 10

Do you find from a preponderance of the evidence that such failure, if you have so found, was a proximate cause, in whole or in part, of the injuries sustained by J. T. Hullum?

Answer: "We do" or "We do not".

Answer:

SPECIAL ISSUE NO. 11

Do you find from a preponderance of the evidence that the death of J. T. Hullum was not due solely to natural causes?

Answer: "It was not due solely to natural causes",
or
"It was due solely to natural causes".

Answer: It was not due solely to natural causes.

SPECIAL ISSUE NO. 12

Do you find from a preponderance of the evidence that the injuries of J. T. Hullum received on December 13, 1961, were, in whole or in part, a producing cause of his death on or about January 8, 1962?

Answer: "They were a producing cause", or "They were not a producing cause"

Answer: They were a producing cause.

SPECIAL ISSUE NO. 13

Do you find from a preponderance of the evidence that at the time, place and on the occasion in question J. T. Hullum failed to keep a proper lookout for his own safety?

Answer: "We do" or "We do not".

Answer: We do not.

By the term "proper lookout" as used herein in meant such a lookout as would have been kept by an ordinary prudent person in the exercise of ordinary care under the same or similar circumstances.

If you have answered Special Issue No. 13 "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 14.

Do you find from a preponderance of the evidence that such failure, if any you have found in answer to Special

Issue #13, was a proximate cause, in whole or in part, of the injuries received by J. T. Hullum on the occasion in question?

Answer: "We do" or "We do not."

Answer:

Do you find from a preponderance of the evidence that immediately prior to the fall in question J. T. Hullum assumed an unsteady position on the top of the box car in question?

Answer: "We do" or "We do not."

Answer: We do not.

If you have answered Special Issue No. 15 "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 16

Do you find from a preponderance of the evidence that such conduct, if any you have found in answer to the preceding Special Issue, was negligence?

Answer: "We do" or "We do not."

Answer:

If you have answered Special Issue #16 "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 17

Do you find from a preponderance of the evidence that such negligence, if any you have found in answer to Special Issue No. 16, was a proximate cause, in whole or

in part, of the injuries received by J. T. Hullum on the occasion in question?

Answer: "We do" or "We do not."

Answer:

SPECIAL ISSUE NO. 18

Do you find from a preponderance of the evidence that on the occasion in question J. T. Hullum failed to brace himself upon the box car at the time the cut of six cars was uncoupled from the remaining cars as an ordinary prudent person would have done under the same or similar circumstances?

Answer "We do" or "We do not."

ANSWER: We do not.

If you have answered Special Issue No. 18, "We do", and only in that event, then answer:

SPECIAL ISSUE NO. 19

Do you find from a preponderance of the evidence that such failure, if any you have found in answer to Special Issue No. 18, was a proximate cause of the injuries received by J. T. Hullum on the occasion in question?

Answer "We do" or "We do not."

ANSWER: _____.

SPECIAL ISSUE NO. 20

Do you find from a preponderance of the evidence that the occurrence in question was not the result of an unavoidable accident?

Answer: "It was not the result of an unavoidable accident" or

"It was the result of an unavoidable accident."
Answer: It was the result of an unavoidable accident.

By the term "unavoidable accident" as used herein is meant the unforeseen, and unanticipated happening of an event, not proximately caused by the negligent act or omission of either the Plaintiff's decedent or the Defendant or its other employees on the occasion in question.

You are instructed that in considering your answers to Special Issues No. 21, 22, 23, and 24, you cannot take into consideration for any purpose the grief, sorrow or distress of mind, if any, experienced by the plaintiffs in this cause, or any of them, or either of them, because of the death of J. T. Hullum, nor the loss to them of the companionship and society of the said J. T. Hullum, or any matter or thing of a like nature, but shall confine yourselves exclusively to the elements of damage set forth in such following issues No. 21, 22, 23 and 24.

SPECIAL ISSUE NO. 21

What sum of money, if any, do you find from a preponderance of the evidence, would fairly and reasonably compensate the Estate of J. T. Hullum, for damages, if any, sustained by him as a direct result of the injuries he received on December 13, 1961, taking into consideration the following elements of damage, if any, and none other:

(a) Such physical pain and mental suffering as the Plaintiff's decedent, J. T. Hullum, may have sustained from December 13, 1961, up until the date of his

death, on January 8, 1962, as a direct result of his injuries.

(b) The loss of earnings, if any, which the Plaintiffs' decedent, J. T. Hullum, has sustained from December 13, 1961, up until the date of his death on January 8, 1962, as a direct result of his injuries.

Answer by stating the amount which you find, if any, in dollars and cents.

Answer: $10,000.

SPECIAL ISSUE NO. 22

What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate the minor plaintiff, Richard Sidney Hullum, for the loss sustained, if any, by him as a direct result of the death of his father, J. T. Hullum, taking into consideration, exclusively, the following elements of damage and none other.

(a) The present cash value, if any, of such pecuniary benefits, if any, which you may find and believe, from a preponderance of the evidence, that the minor plaintiff, Richard Sidney Hullum, would have in reasonable probability received from the deceased, J. T. Hullum, in the form of services and contributions to his maintenance and support from and after the date of his father's death, and in the future if the minor plaintiff would have in reasonable probability received such benefits.

By "pecuniary" benefits, as used herein, is meant not only money but anything that can be valued in money.

(b) The present cash value, if any, of the services, if any, which you may find and believe from a preponderance of the evidence that the deceased, J. T. Hullum, would have in reasonable probability rendered, to the minor plaintiff in his nurture, care, education and advice after January 8, 1962, but for his father's death, if you believe from a preponderance of the evidence that the deceased, J. T. Hullum, would have in reasonable probability rendered to the minor plaintiff such services in his nurture, care, education and advice.

You will answer this Issue by stating the amount in dollars and cents, if any you find, in accordance with the instructions preceding.

Answer: $20,000.

SPECIAL ISSUE NO. 23

What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate the minor plaintiff, Cynthia Ann Hullum, for the loss sustained, if any, by her as a direct result of the death of her father, J. T. Hullum, taking into consideration, exclusively, the following elements of damage and none other:

(a) The present cash value, if any, of such pecuniary benefits, if any, which you may find and believe, from a preponderance of the evidence that the minor plaintiff, Cynthia Ann Hullum, would have

in reasonable probability received from the deceased, J. T. Hullum, in the form of services and contributions to her maintenance and support from and after the date of her father's death, and in the future if the minor plaintiff would have in reasonable probability received such benefits.

By "pecuniary" benefits, as used herein, is meant not only money but anything that can be valued in money.

(b) The present cash value, if any, of the services, if any, which you may find and believe from a preponderance of the evidence that the deceased, J. T. Hullum, would have in reasonable probability rendered to the minor plaintiff in her nurture, care, education and advice after January 8, 1962, but for her father's death, if you believe from a preponderance of the evidence that the deceased J. T. Hullum, would have in reasonable probability rendered to the minor plaintiff such services in her nurture, care, education and advice.

You will answer this Issue by stating the amount in dollars and cents, if any you find, in accordance with the instructions preceding.

Answer: $20,000.

SPECIAL ISSUE NO. 24

What sum of money, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate the plaintiff, Mrs. Adelle Hullum, for the loss sustained, if any, by her as a direct result of

the death of her husband, J. T. Hullum, taking into consideration, exclusively, the following elements of damage and none other:

(a) The present cash value, if any, of such pecuniary benefits, if any, which you may find and believe, from a preponderance of the evidence, that the plaintiff, Mrs. Adelle Hullum, would have in reasonable probability received from the deceased, J. T. Hullum, in the form of services and contributions, if any, advice and counsel, if any, in the future, from and after the date of his death, if she would in reasonable probability have received such benefits had he lived.

By "pecuniary" benefits as used herein, is meant not only money, but anything that can be valued in money.

You will answer this issue by stating the amount in dollars and cents, if any you find.

Answer: $42,500.

If in answer to any of the special issues contained in this charge you have found that the plaintiff's decedent, J. T. Hullum, was negligent or failed to exercise ordinary care, which was a proximate cause of his injuries and death, if you have so found, and if you have also found in answer to any of the special issues that the Defendant or any of its other employees were negligent or failed to exercise ordinary care, which was a proximate cause in whole or in part, of the plaintiff's decedent's injuries and death, if you have so found, then answer the following special issue:

SPECIAL ISSUE NO. 25

What per cent do you find from a preponderance of the evidence does the negligence of the plaintiff's decedent bear to the entire combined negligence of both the plaintiff's decedent and the defendant or its other employees?

Answer by stating the percentage, if any: none.

You are instructed that when you retire to the Jury room to consider your verdict, you will first elect your foreman and will then read and consider the instructions carefully. Then you will take up and consider the special issues submitted to you and will answer them in accordance with the instructions given you. When you have agreed as to what your answer to a given special issue is to be you will have that answer written into the proper blank; and when you have finished you will have the verdict signed by your foreman and will return same into open Court.

/s/ CONNALLY McKAY
Judge Presiding

We, the jury, return as our verdict the answers to the special issues, as shown following said special issues.

/s/ J. W. BRITTON
Foreman of the Jury

APPENDIX "L"

No. 62-28

MRS. ADELLE HULLUM, ADMISTRATRIX, ET AL.

vs.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

In The 114th Judicial District Court
Of Smith County, Texas

PLAINTIFF'S SPECIALLY REQUESTED INSTRUCTION NO. 2

"You are further instructed that the Defendant railroad is under a continuing non-delegable duty to provide its employees including the Plaintiffs' decedent, J. T. Hullum, with a reasonably safe place in which to work."

Respectfully submitted,

/s/ George L. Schmidt
Attorney for Plaintiff

And by the Court Refused

/s/ Connally McKay
Judge Presiding

Filed: October 11, 1963

APPENDIX "M"

PLAINTIFF'S SPECIALLY REQUESTED SPECIAL ISSUE NO. 1-A

Do you find from a preponderance of the evidence that kicking of the cars on the occasion in question on a down grade was negligence?

Answer: "We do" or "We do not."

Answer:

Respectfully submitted,

SCHMIDT & GARRETT
MCLENDON & TYNER

By /s/ J. W. Tyner
Attorneys for Plaintiff

Timely presented and by the Court REFUSED, to which action the Plaintiff excepted.

/s/ CONNALLY MCKAY
Judge Presiding

PLAINTIFF'S SPECIALLY REQUESTED SPECIAL ISSUE NO. 2-A

If you have answered Special Issue #1-A "We do" and only in that event, then answer:

SPECIAL ISSUE NO. 2-A

Do you find from a preponderance of the evidence that such negligence, if any, was a proximate cause, in whole

or in part of the injuries received by J. T. Hullum on the occasion in question?

Answer: "We do" or "We do not."

Answer:

Respectfully submitted,

SCHMIDT & GARRETT
MCLENDON & TYNER

By /s/ J. W. Tyner
Attorneys for Plaintiff

Timely presented and by the Court REFUSED, to which action the Plaintiff excepted.

/s/ CONNALLY MCKAY
Judge Presiding

PLAINTIFF'S SPECIALLY REQUESTED ISSUE NO. 3-A

Do you find from a preponderance of the evidence that the Defendant's crew on the occasion in question kicked the cars in question without first determining that J. T. Hullum was in a safe position aboard the car he was riding?

Answer: "We do" or "We do not."

Answer:

Respectfully submitted,

SCHMIDT & GARRETT
MCLENDON & TYNER

By /s/ J. W. Tyner
Attorneys for Plaintiff

Timely presented and by the Court REFUSED, to which action the Plaintiff excepted.

/s/ CONNALLY MCKAY
Judge Presiding

If you have answered Special Issue No. 3-A "we do" and only in that event, then answer:

SPECIAL ISSUE NO. 4-A

Do you find from a preponderance of the evidence that such action, if any, was negligence?

Answer: "We do" or "We do not."

Answer:

Respectfully submitted,

SCHMIDT & GARRETT
MCLENDON & TYNER

By /s/ J. W. Tyner
Attorneys for Plaintiff

Timely presented and by the Court REFUSED, to which action the Plaintiff excepted.

/s/ CONNALLY MCKAY
Judge Presiding

If you have anaswered Special Issue #4-A "We do" and only in that event, then answer:

SPECIAL ISSUE NO. 5-A

Do you find from a preponderance of the evidence that such negligence, if any, was a proximate cause, in whole or

in part of the injuries received by J. T. Hullum on the occasion in question?

Answer: "We do" or "We do not."

Answer:

Respectfully submitted,

SCHMIDT & GARRETT
MCLENDON & TYNER

By /s/ J. W. Tyner
Attorneys for Plaintiff

Timely presented and by the Court REFUSED, to which action the Plaintiff excepted.

/s/ CONNALLY MCKAY
Judge Presiding

APPENDIX "N"

No. 62-28

MRS. ADELLE HULLUM, ADMINISTRATRIX
vs.
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

In The 114th Judicial District Court
Of Smith County, Texas

PLAINTIFF MRS. ADELLE HULLUM, ADMINISTRATRIX'S EXCEPTIONS AND OBJECTIONS TO THE CHARGE OF THE COURT

Comes now the Plaintiff, Mrs. Adelle Hullum, Administratrix, and respectfully points out to the Court what the Plaintiff considers to be insufficient and incorrect in the Court's Charge and respectfully objects and excepts to the submission of the Charge as a whole, for the following reasons and grounds:

I.

The Charge of the Court to the Jury in this case is insufficient, in that the Court has failed to include within the Charge instructions designated as Plaintiff's Special Requested Instruction #1, which instruction reads as follows:

> "You are further instructed that the Administratrix, Mrs. Adelle Hullum, is not permitted by law to give evidence relating to any transaction or conversation with, or statement by, the deceased, J. T. Hullum,

unless she were called to testify thereto by the defendant."

For the reason that the Statutes of the State of Texas provide for the giving of such instruction to the Jury in death cases.

II.

Plaintiff objects and excepts to the Court's Charge as a whole, for the further reason that the Charge does not contain within it the instruction requested in Plaintiff's Special Requested Instruction #2, which reads as follows:

"You are further instructed that the Defendant railroad is under a continuing non-delegable duty to provide its employees, including the Plaintiffs' decedent, J. T. Hullum, with a reasonably safe place in which to work."

III.

Plaintiff objects and excepts to the Court's Charge as a whole for the reason that the Court has failed to submit to the Jury Plaintiff's Special Requested Special Issues #1-A and #2-A, inquiring as to the negligence of the Defendant on the occasion in question in kicking the cars on a down grade, and the failure to include within the Charge Plaintiff's Special Requested Special Issues #3-A, 4-A, and 5-A, inquiring of the Jury as to whether on the occasion in question, the Defendant's crew kicked the cars without first determining that the Plaintiff's decedent was in a safe position on the car he was riding, and whether that was negligence and whether such negligence, if any,

was a proximate cause in whole or in part of the Plaintiffs' decedent's injuries.

Plaintiff at this time respectfully requests the Court to include within his Charge such Definitions and Special Issues as requested.

IV.

Plaintiff further respectfully objects and excepts to the submission to the Jury of Special Issue #13, for the following reasons:

(a) There is no evidence to warrant the submission of such issue to the Jury.

(b) There is insufficient evidence in the record to warrant the submission of the issue to the Jury.

(c) An affirmative finding by the Jury to such Special Issue would be so contrary to the overwhelming weight and preponderance of the evidence as to be manifestly wrong and unjust.

V.

Plaintiff objects and excepts to the submission to the Jury of Special Issue #14 for the following reasons:

(a) There is no evidence to warrant the submission of such issue to the Jury.

(b) There is insufficient evidence in the record to warrant the submission of the issue to the Jury.

(c) An affirmative finding by the Jury to such Special issue would be so contrary to the overwhelming weight

and preponderance of the evidence as to be manifestly wrong and unjust.

VI.

Plaintiff further respectfully objects and excepts to the submission to the Jury of Special Issue #15, for the following reasons:

(a) There is no evidence to warrant the submission of such issue to the Jury.

(b) There is insufficient evidence in the record to warrant the submission of the issue to the Jury.

(c) An affirmative finding by the Jury to such Special Issue would be so contrary to the overwhelming weight and preponderance of the evidence as to be manifestly wrong and unjust.

(d) For the reason that this is in effect a double submission of the same ultimate fact to be determined by the Jury, in that the Court also is submitting to the Jury Special Issue #18, which inquires as to whether Hullum failed to brace himself on the boxcar.

(e) The injury as to whether the Plaintiffs' decedent assumed an unsteady position and inquiry as to whether the Plaintiffs' decedent failed to brace himself are one and the same inquiry and is merely a splitting of the inquiry into two parts or shading of the same issue, thus over emphasizes the Defendant's defense and causes and undue burden on the Plaintiff, to the Plaintiff's prejudice.

VII.

Plaintiff further respectfully objects and excepts to the submission to the Jury of Special Issue #16, for the following reasons:

(a) There is no evidence to warrant the submission of such issue to the Jury.

(b) There is insufficient evidence in the record to warrant the submission of the issue to the Jury.

(c) An affirmative finding by the Jury to such Special Issue would be so contrary to the overwhelming weight and preponderance of the evidence as to be manfestly wrong and unjust.

VIII.

Plaintiff further respectfully objects and excepts to the submission to the Jury of Special Issue #17, for the following reasons:

(a) There is no evidence to warrant the submission of such issue to the Jury.

(b) There is insufficient evidence in the record to warrant the submission of the issue to the Jury.

(c) An affirmative finding by the Jury to such Special Issue would be so contrary to the overwhelming weight and preponderance of the evidence as to be manifestly wrong and unjust.

IX.

Plaintiff objects and excepts to the submission to the Jury of Special Issue #18, for the following reasons:

(a) There is no evidence to warrant the submission of said issue to the Jury.

(b) There is insufficient evidence in the record to warrant the submission of the issue to the Jury.

(c) An affirmative finding by the Jury to such Special Issue would be so contrary to the overwhelming weight and preponderance of the evidence as to be manifestly wrong and unjust.

(d) For the reason that this is in effect a double submission of the same ultimate fact to be determined by the Jury, in that the Court also is submitting to the Jury Special Issue #15, which inquires as to whether J. T. Hullum assumed an unsteady position on the top of the boxcar. The inquiry as to whether the Plaintiffs' decedent assumed an unsteady position and the inquiry as to whether the Plaintiffs' decedent failed to brace himself are one and the same inquiry and is merely a splitting of the inquiry into two parts, or a shading of the same issue, thus over emphasizes the Defendant's defense and causes an undue burden on the Plaintiff, to the Plaintiff's prejudice.

X.

Plaintiff objects and excepts to the submission to the Jury of Special Issue #20, because said issue again is in effect a double submission of all the issues in the case and places upon the Plaintiff a double burden, not only requiring the Plaintiff to establish by a preponderance of the evidence that Defendant was negligent in some respect or another, but also the further burden to prove by a preponderance of the evidence that the Defendant was guilty of negligence so that under the definition of an

unavoidable accident, that negligence which did occur on the part of the Defendant proximately caused the Plaintiff's injury and damages.

For the further reason that the submission of such issue to the Jury would require Plaintiff to disprove by a preponderance of the evidence any other agency or person having anything to do with the occurrence in question and therefore actually requires the Plaintiff to assume the additional burden of proving there was no other agency, when there was no pleading or facts in the case that there was any other agency or person involved.

XI.

That such objections and exceptions as made, and requests as tendered to the Court herein for the inclusion in the Charge, the requested instructions and requested Special Issues were made after the evidence was closed and were made at a time sufficiently appropriate and prior to the submission of such Charge to the Jury.

Respectfully submitted,

Schmidt, Garrett, Schmidt and Hensley

By /s/ George L. Schmidt
Attorneys for Plaintiff

Timely presented to the Court and Overruled, except as met by the main Charge submitted to the Jury, to which action of the Court Plaintiff excepted.

/s/ CONNALLY MCKAY
Judge Presiding

APPENDIX "O"

NO. 62-28

MRS. ADELLE HULLUM, ADMINISTRATRIX, ET AL.
vs.
ST. LOUIS SOUTHWESTERN RAILWAY COMPANY

In the District Court of Smith County, Texas
114th Judicial District

PLAINTIFF'S AMENDED MOTION FOR NEW TRIAL

Plaintiff, Mrs. Adelle Hullum, Administratrix, in the above entitled and numbered cause, by this, her amended motion for new trial filed with leave of court in lieu of her original motion for new trial, filed herein on the 24th day of October, 1963, moves the Court to set aside the verdict and judgment heretofore rendered against her and to grant a new trial herein, upon the following grounds, to-wit:

I.

The verdict of the Jury is contrary to the evidence.

II.

The verdict of the Jury is contrary to the law.

III.

The findings of the Jury in response to Special Issue No. 1 of its verdict is contrary to the evidence, and such negative answer by the Jury to Special Issue No. 1 is so

against the overwhelming weight and preponderance of the evidence as to be manifestly wrong and unjust.

IV.

The findings of the Jury in response to Special Issue No. 3 of its verdict is contrary to the evidence, and such negative answer by the Jury to Special Issue No. 3 is so against the overwhelming weight and preponderance of the evidence as to be manifestly wrong and unjust.

V.

The findings of the Jury in response to Special Issue No. 5 of its verdict is contrary to the evidence, and such negative answer by the Jury to Special Issue No. 5 is so against the overwhelming weight and preponderance of the evidence as to be manifestly wrong and unjust.

VI.

The findings of the Jury in response to Special Issue No. 7 of its verdict is contrary to the evidence, and such negative answer by the Jury to Special Issue No. 7 is so against the overwhelming weight and preponderance of the evidence as to be manifestly wrong and unjust.

VII.

The findings of the Jury in response to Special Issue No. 9 of its verdict is contrary to the evidence, and such negative answer by the Jury to Special Issue No. 9 is so against the overwhelming weight and preponderance of the evidence as to be manifestly wrong and unjust.

VIII.

The findings of the Jury in response to Special Issue No. 20 of its verdict is contrary to the evidence, and such answer by the Jury to Special Issue No. 20 is so against the overwhelming weight and preponderanace of the evidence as to be manifestly wrong and unjust.

IX.

The Court erred in failing to submit Plaintiff's Specially Requested Instruction No. 1 reading, "You are further instructed that the Administratrix, Mrs. Adelle Hullum, is not permitted by law to give evidence relating to any transaction or conversation with, or statement by, the deceased, J. T. Hullum, unless she were called to testify thereto by the defendant", and quote it in its charge to the Jury because the Plaintiff Administratrix could not under the law give evidence relating to any transaction or conversation with, or statement by the deceased, J. T. Hullum, because of the Dead Man's Statute, Article 3716, Revised Civil Statutes of the State of Texas, and such instruction should have been given by the Court for the guidance of the Jury.

X.

The Court erred in admitting the testimony of Engine Foreman W. B. Bradley concerning conversations with the Plaintiff's decedent to the effect that Plaintiff's decedent did not blame anyone for his injury, when such testimony was clearly inadmissible and in contravention of the Dead Man's Statute, Article 3716, Revised Civil Statutes of the State of Texas, the suit being brought by the Administra-

trix and the conversation being between the agent of the Defendant and the decedent.

XI.

The Court erred in refusing to include Plaintiff's Specially Requested Instructions No. 2 reading, "You are further instructed that the Defendant Railroad is under a continuing non-delegable duty to provide its employees including the Plaintiff's decedent, J. T. Hullum, with a reasonably safe place in which to work, to the Jury in its charge to the Jury, because the Jury, by not having such instructions to guide them in their deliberations, could reasonably have deduced and assumed that the testimony of the engine foreman, Mr. W. B. Bradley, to the effect that the decisions of whether to kick or not to kick cars, as well as the decision as to how hard to kick and when to kick cars, were matters left solely to his discretion, which amounted to relieving the Defendant from liability for negligence because it having delegated such decisions to its engine foreman and by its refusal to give such instruction, the Court thereby deprived the Plaintiff of her federally created rights under the Federal Employer's Liability Act through local practice and procedures.

XII.

The Court erred in refusing to submit Plaintiff's Special Issue No. 1A, reading, "Do you find from a preponderance of the evidence that kicking of the cars on the occasion in question on a down grade was negligence?", to the Jury in its charge when there was ample evidence to warrant the submission of the issue to the Jury to the effect that it it was well known that kicking of cars was dangerous and

that kicking cars on a down hill grade was dangerous when men were not in a safe position aboard such cars that were being kicked; that the Special Issue was supported by pleadings and the law being that the Jury is the determiner of questions of negligence, such refusal to submit such Special Issue No. 1A deprived Plaintiff of her federally created rights under the Federal Employer's Liability Act by the Court's local practice and procedures.

XIII.

The Court erred in refusing to submit Plaintiff's Special Issue No. 2A reading, "If you have answered Special Issue No. 1A 'we do' and only in that event, then answer: Special Issue No. 2A—Do you find from a preponderance of the evidence that such negligence, if any, was a proximate cause, in whole or in part of the injuries received by J. T. Hullum on the occasion in question?", to the Jury in its charge when there was ample evidence to warrant the submission of the issue to the Jury, that the Special Issue was supported by pleadings and the law being that the Jury is the determiner of questions of negligence and proximate cause, such refusal to submit such Special Issue No. 2A deprived Plaintiff of her federally created rights under the Federal Employer's Liability Act by the Court's local practice and procedure.

XIV.

The Court erred in refusing to submit Plaintiff's Special Issue No. 3A reading, "Do you find from a preponderance of the evidence that the Defendant's crew on the occasion in question kicked the cars in question without first determining that J. T. Hullum was in a safe position aboard

the car he was riding?", to the Jury in its charge when there was ample evidence to warrant the submission of the issue to the Jury, especially in view of the testimony of the engine foreman, W. B. Bradley, that it was dangerous to kick cars without first knowing that the men who were to ride such cars that were being kicked were in a safe position aboard such cars that were being kicked and that because of the position of the cars and the fact that the plaintiff's decedent was on the other side of the cars from him and he could not see whether Plaintiff's decedent was in a safe position at the time that he kicked such cars down hill; that the Special Issue was supported by pleadings and the law being that the Jury is the determiner of questions of negligence and proximate cause, such refusal to submit such Special Issue No. 3A deprived Plaintiff of her federally created rights under the Federal Employer's Liability Act by the Court's local practice and procedure.

XV.

The Court erred in refusing to submit Plaintiff's Special Issue No. 4A reading, "If you have answered Special Issue No. 3A 'we do' and only in that event, then answer: Special Issue No. 4A—Do you find from a preponderance that such action, if any, was negligence?", to the Jury in its charge when there was ample evidence to warrant the submission of the issue to the Jury; that the Special Issue was supported by pleadings and the law being that the Jury is the determiner of questions of negligence and proximate cause, such refusal to submit such Special Issue No. 4A deprived Plaintiff of her federally created rights under the Federal Employer's Liability Act by the Court's local practice and procedure.

XVI.

The Court erred in refusing to submit Plaintiff's Special Issue No. 5A reading, "If you have answered Special Issue No. 4A 'we do' and only in that event, then answer: Special Issue No. 5A—Do you find from a preponderance of the evidence that such negligence, if any, was a proximate cause, in whole or in part, of the injuries received by J. T. Hullum on the occasion in question?", to the Jury in its charge when there was ample evidence to warrant the submission of the issue to the Jury; that the Special Issue was supported by pleadings and the law being that the Jury is the determiner of questions of negligence and proximate cause, such refusal to submit such Special Issue No. 5A deprived Plaintiff of her federally created rights under the Federal Employer's Liability Act by the Court's local practice and procedure.

XVII.

The Court erred in refusing to admit testimony of the witnesses relating to prior accidents and injuries occurring in the Tyler Yards of the St. Louis Southwestern Railway Company where employees were injured by kicking movements when such evidence was obtained for the limited purpose of showing notice and knowledge on the part of the Defendant that the engaging in the practice of kicking cars on a down hill grade when men were to ride such cars was a dangerous and unnecessary practice and would probably result in injury to such employees riding such cars when they were kicked and that by the refusal to admit such evidence to the Jury the Court by its local practice and procedures altered and denied the Plaintiff's

federally created rights under the Federal Employer's Liability Act.

XVIII.

The Court erred in permitting, over the objections of the Plaintiff, the introduction into evidence by the showing of motion pictures, of a kicking movement made a long time after the occasion in which it was obvious from a preview of the pictures that they were a "staged" production at a slow rate of speed and where the men on the cars being kicked were not in the same position as the Plaintiff's decedent was on the occasion in question. Such motion pictures were immaterial and highly prejudicial and by the admitting of such evidence the Court erred.

XIX.

The Court erred in entering Judgment for the Defendant instead of the Plaintiff.

WHEREFORE, the Plaintiff prays that the verdict and the judgment herein be set aside and that she be awarded a new trial.

Respectfully submitted,

SCHMIDT & GARRETT

By /s/ George L. Schmidt
1307 American Investors Building
Houston, Texas 77002 CA 2-2268
Attorneys for Plaintiff,
Mrs. Adelle Hullum,
Administratrix

APPENDIX "P"

VERNON'S ANNOTATED TEXAS RULES OF CIVIL PROCEDURE

RULE 277. SPECIAL ISSUES

In all jury cases the court may submit said cause upon special issues without request of either party, and, upon request of either party, shall submit the cause upon special issues raised by the written pleadings and the evidence in the case, except that, for good cause subject to review or on agreement of the parties, the court may submit the same on a general charge. Such special issues shall be submitted distinctly and separately and each issue shall be answered by the jury separately, provided that, if it be deemed advisable, the court may submit disjunctively in the same question two inconsistent issues where it is apparent from the evidence that one or the other of the conditions or facts inquired about necessarily exists. For example, the court may, in a workmen's compensation case, submit in one question whether the injured employee was permanently or only temporarily disabled. Where practicable, all issues should be submitted in the affirmative and in plain and simple language. It is proper to so frame the issue as to place the burden of proof thereon, but where, in the opinion of the court, this cannot be done without complicating the form of the issue, the burden of proof on such issue may be placed by a separate instruction thereon. In submitting special issues the court shall submit such explanatory instructions and such definitions of legal terms as shall be necessary to enable the jury to properly pass upon and render a verdict on such

issues, and in such instances the charge shall not be subject to the objection that it is a general charge. If the nature of the suit is such that it cannot be determined on the submission of special issues, the court may refuse the request to do so, but the action of the court in refusing may be reviewed on proper exception in the appellate court, and this rule shall be construed in connection with the succeeding rule. Amended by order of March 31, 1941.

APPENDIX "Q"

RULE 279. SUBMISSION OF ISSUES

When the court submits a case upon special issues, he shall submit the controlling issues made by the written pleadings and the evidence, and, except in trespass to try title, statutory partition proceedings and other special proceedings in which the pleadings are specially defined by statutes or procedural rules, a party shall not be entitled to an affirmative submission of any issue in his behalf where such issue is raised only by a gener l denial and not by an affirmative written pleading on his part. Nothing herein shall change the burden of proof from what it would have been under a general denial. Where the court has fairly submitted the controlling issues raised by such pleading and the evidence, the case shall not be reversed because of the failure to submit other and various phases or different shades of the same issue. Failure to submit an issue shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by

the party complaining of the judgment; provided, however, that objection to such failure shall suffice in such respect if the issue is one relied upon by the opposing party. Failure to submit a definition or explanatory instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or explanatory instruction has been requested in writing and tendered by the party complaining of the judgment.

Upon appeal all independent grounds of recovery or of defense not conclusively established under the evidence and upon which no issue is given or requested shall be deemed as waived; but where such ground of recovery or of defense consists of more than one issue, if one or more of the issues necessary to sustain such ground of recovery or of defense, and necessarily referable thereto, are submitted to and answered by the jury, and one or more of such issues are omitted, without such request, or objection, and there is evidence to support a finding thereon, the trial court, at the request of either party, may after notice and hearing and at any time before the judgment is rendered, make and file written findings on such omitted issue or issues in support of the judgment, but if no such written findings are made, such omitted issue or issues shall be deemed as found by the court in such manner as to support the judgment. A claim that the evidence was insufficient to warrant the submission of any issue may be made for the first time after verdict, regardless of whether the submission of such issue was requested by the complaining party. Amended by Order of March 31, 1941.

APPENDIX "R"

F. VERDICT

RULE 290. DEFINITION AND SUBSTANCE

A verdict is a written declaration by a jury of its decision, comprehending the whole or all the issues submitted to the jury, and shall be either a general or special verdict, as directed, which shall be signed by the foreman of the jury.

A general verdict is one whereby the jury pronounces generally in favor of one or more parties to the suit upon all or any of the issues submitted to it. A special verdict is one wherein the jury finds the facts only on issues made up and submitted to them under the direction of the court.

A special verdict shall, as between the parties, be conclusive as to the facts found.

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In the

Supreme Court of the United States

OCTOBER TERM 1965

No. 488

MRS. ADELLE HULLUM, Administratrix,
Petitioner,

v.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

CLYDE W. FIDDES,
GALLOWAY CALHOUN, JR.,
JACK W. FLOCK,
Citizens First National Bank Bldg.,
P. O. Box 629,
Tyler, Texas 75702.

Of Counsel:
CLYDE W. FIDDES
GALLOWAY CALHOUN, JR.
RAMEY, BRELSFORD, FLOCK & DEVEREUX

WARLICK PRESS, INC.—2263 VALDINA STREET—DALLAS—ME 1-3130

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In the

Supreme Court of the United States

OCTOBER TERM 1965

No. 488

MRS. ADELLE HULLUM, Administratrix,
Petitioner,

v.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE TWELFTH SUPREME JUDICIAL DISTRICT OF TEXAS, SITTING AT TYLER, TEXAS

COUNTER STATEMENT OF QUESTIONS PRESENTED

I. Will Respondent be denied the protection of the Seventh Amendment to the United States Constitution?

II. No federally created right under the Federal Employers' Liability Act was denied Petitioner by refusing Petitioner's requested Issues Numbers 1-A and 2-A, inquiring as to the negligence and proximate cause in

"kicking cars on the occasion in question on a downgrade", because the Issues had been fully and fairly submitted to the Jury in other Issues to which no objections were made by Petitioner.

III. No federally created right under the Federal Employers' Liability Act was denied Petitioner by refusing Petitioner's requested Issues Numbers 3-A, 4-A and 5-A, inquiring as to whether Respondent was guilty of actionable negligence in "kicking cars" without first determining that J. T. Hullum was in a safe position aboard the car he was riding, because the Issues had been fully and fairly submitted to the Jury in other Issues to which no objections were made by Petitioner.

IV. The refusal of Petitioner's Specially Requested Instruction No. 2, reading as follows:

> "You are further instructed that the Defendant Railroad is under a continuing, non-delegable duty to provide its employees, including the Plaintiff's decedent, J. T. Hullum, with a reasonable (sic) safe place within which to work."

was not a denial of a federally created right under the Federal Employers' Liability Act because such an Instruction was not necessary to enable the jury to pass upon the Issues submitted.

V. The Trial Court's submission to the Jury of an issue on unavoidable accident and the Appellate Court's refusal to set aside the jury's findings thereon did not deny to Petitioner any federally created right.

a. Petitioner has not properly preserved alleged error in regard to the submission of such Issue inasmuch as Petitioner objected only upon the ground that the same was a double submission of other issues and enlarged her burden of proof.

b. If the point had been properly preserved, the submission of the Issue was proper because it placed no onerous burden upon the Petitioner and, inasmuch as Petitioner did not procure a finding of actionable negligence against Respondent, the finding of the jury on unavoidable accident is immaterial.

VI. No federally created right was denied Petitioner by admitting into evidence (a) a conversation between Respondent's Engine Foreman, W. B. Bradley, and Petitioner's decedent, J. T. Hullum, and (b) motion pictures demonstrating to the Jury the type of "kicking operations" used in the Tyler Yards, because the evidence, under Federal as well as Texas Court Decisions, is clearly competent and admissible under the facts of this case.

VII. No federally created right was denied Petitioner because there has been no improper judicial review by the Appellate Courts below.

COUNTER STATEMENT

Having selected the forum of the Texas District Court, Petitioner instituted this suit against Respondent seeking damages under the Federal Employers' Liability Act[1] for the alleged wrongful death of her husband, J. T. Hullum. The Safety Appliance Act[2] is not here involved. Petitioner's

[1] Title 45, Section 51, U.S.C.A.
[2] Title 45, Sections 1-46, incl., U.S.C.A.

Decedent, J. T. Hullum, was a member of Respondent's switching crew. He received an injury falling from a boxcar in the Tyler, Texas, Yard on December 13, 1961. It was thought that he was making a good recovery, but suddenly on January 8, 1962, he died, apparently from a blood clot. (S.F. 295) Several acts of negligence were alleged; issues were fully joined by Respondent and the cause was tried before a jury in October, 1963. The cause was submitted to the Jury upon Special Issues under the Texas practice and procedure.[3] Petitioner did not object to the Special Issue submission. By its verdict, the Jury (a) absolved Respondent of negligence; (b) absolved Decedent Hullum of any acts of contributory negligence, (c) found that Hullum's death was the result of an unavoidable accident, and (d) found damages in several sums to various beneficiaries under the Act. Judgment was accordingly rendered for Respondent. The Trial Court carefully submitted the cause, defining the various terms in accordance with Federal decisional law under the Federal Employers' Liability Act. Although Petitioner fully presented all phases of the case to the Jury, she failed to obtain a finding of actionable negligence against Respondent. The Judgment of the Trial Court was Affirmed by the Court of Civil Appeals for the Twelfth Supreme Judicial District sitting at Tyler, Texas, and Writ of Error has been by the Supreme Court of Texas Refused, with the notation, "No Reversible Error." In her Petition for Certiorari, Petitioner now asks this Honorable Court to disregard the fact findings made by the lawfully constituted fact finder and to substitute its views in the

[3] Rules 271-279, incl., Texas Rules of Civil Procedure

way Petitioner claims the Jury should have found the facts. Petitioner prays this Court to upset this Jury verdict on the ever-elusive and nebulous contention that because the Jury did not give credence to her theory of the case, she was denied some "federally created" right. The Petitioner, insofar as is discernable to us, does not make clear the "federally created" right or rights she was denied. This brings us to remark that we cannot accept the unnecessarily verbose "review" of the evidence by Petitioner, appearing at Pages 10-16 of the Petition for Certiorari because only a portion thereof—slanted to her view—is mentioned. For instance, at Page 11 of said Petition it is stated that "Switchman Strother saw this happen, and is the only eye witness to the event." Petitioner does not mention that Witness Strother *gave two different versions* of the occurrence and his credibility before the Jury was totally destroyed. (Cf. S.F. 45-49, with S.F. 454-465.) An abundance of evidence was offered by Respondent showing an absence of any negligence on the part of Respondent or any member of Respondent's switching crew. We regret the length to which we are put in order to reply to the Petition, but deem it appropriate to demonstrate that the record amply supports and, in fact, almost compels the jury verdict.

The record discloses that Engine Foreman Bradley testified that J. T. Hullum aligned the proper switch and crossed to the opposite side of the track and was lost from his view when the boxcars were pushed between him and Mr. Hullum; that when he last saw J. T. Hullum, the latter was in the proper position to ride the cut of cars and set the

brake. This was the *usual* and *customary* way of performing this particular portion of the switching operation. (S.F. 334-336, and 342-344) Crew member Strother testified that he saw J. T. Hullum during the entire portion of the switching operation in question up to and including the time of the accident. (S.F. 69-71 and 74-75) The record is void of any testimony to the effect that any member of the crew failed to keep Hullum in view at a time when ordinary prudence would have demanded that he be in a position to actually see J. T. Hullum.

Witnesses Bradley and G. H. Bivens each testified that the cars were moving at only four to six miles per hour, which they considered a safe speed, taking into account the existing conditions on the occasion in question. (S.F. 154-156, 188-190, 199-210, 346-347, and 392) Bradley further testified that "kicking" the cars was not unusual, but was a *customary practice* in the Tyler Yard. (S.F. 204-207) Bradley testified, and Strother agreed, that the cars in question were not kicked harder than they should have been. Each testified that the "kick" in question was an ordinary one and was "Not too hard". (S.F. 86 and 204-207) Witness Strother further testified that, prior to the accident, Hullum had positioned himself on top of the car. (S.F. 70-71) There was no direct evidence that any member of the switching crew was furnished an unsafe place in which to work. All of the members of the switching crew agreed that at the time of the accident they were performing a *normal switching operation.* (S.F. 160-161) The absence of negligence is further corroborated by the very case history given by J. T. Hullum

several days after the accident, which history was recorded by his physician as follows: "He was on top of a car (moving) trying to get from that car to the next. Then lost his balance. Fell between the two cars on the ground and apparently he was dragged for some distance before the cars came to a stop." (S.F. 469.) Equally important is the admission by J. T. Hullum to Witness Bradley that he "did not hold any member of the crew responsible for the accident." (S.F. 209) This Honorable Court's attention is particularly directed to Bradley's testimony found at Pages 318-351 of the Statement of Facts.

With reference to Petitioner's inference that Hullum was under the influence of dope at the time he gave his above mentioned case history, we need only to refer this Court to the testimony of the admitting physician, Dr. Dimitri Boosalis, whose deposition was taken and offered into evidence by Petitioner. According to Dr. Boosalis, at the time the patient entered the Texarkana Hospital (which was several days after the accident) the patient "was not in distress. * * * He was fully conscious, alert, and able to move his left arm and both his legs." (S.F. 262)

ARGUMENT

I. Will Respondent be denied the protection of the Seventh Amendment to the United States Constitution?

It is apparent that the Petition for Certiorari is simply an appeal by a litigant to a Higher Court to save her from an adverse jury verdict. As has been demonstrated, the evidence was fully presented in the Trial Court and Re-

spondent was by the jury vindicated and absolved of negligence. Surely, Respondent is entitled to the protestion incident to a trial by jury, as provided for in the Federal Employers' Liability Act and as guaranteed by the Seventh Amendment. The jury did not find any negligence against Respondent but Petitioner now asks this Court to substitute its views for those of the Jury and hold to the contrary. This Honorable Court has held many times that the findings of a State Court will be accepted by it where, though the evidence is conflicting, they are not without factual foundation. *Fry Roofing Company v. Wood*, 344 U.S. 157, 97 L. Ed. 168, 73 S. Ct. 204; *Portland Railway Light and Power Co. v. Railroad Commissioner of Oregon*, 229 U.S. 397, 57 L. Ed. 1248; and *Grayson v. Harris*, 267 U.S. 352, 69 L. Ed. 652.

Petitioner is asking this Honorable Court to ignore its rules for testing verdicts in Federal Employers' Liability Act cases. *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500, 1 L. Ed. 2d 493, 77 S. Ct. 443. In the *Rogers* Case, it is stated as follows:

> "Under this statute the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employees contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death.

"The Congress when adopting the law was particularly concerned that the issues whether there was employer fault and whether that fault played any part in the injury or death of the employee should be decided by the jury whenever fair minded men could reach these conclusions on the evidence. * * * Congress corrected (court made theories which defeated employee claims as a matter of law) by the 1939 amendments and removed the fetters which hobbled the full play of the basic Congressional intention to leave to the fact-finding function of the jury the decision of the primary question raised in these cases—whether employer fault played any part in the employee's mishap.

"The decisions of this Court after the 1939 amendment teach that the Congress vested the power of decision in these actions exclusively in the jury in all but the infrequent cases where fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury."

Petitioner apparently regards the *Rogers* case as a holding that the Jury *must* find the Railroad negligent regardless of the credibility of witnesses. If the Jury does not find negligence, Petitioner would have the Appellate Court find entirely contrary to the jury finding absolving the Railroad of actionable negligence. See also *Maynard v. Durham and Southern Ry. Co.*, 365 U.S. 160, 5 L. Ed. 2d 486, 81 S. Ct. 561 (1961) and *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 5 L. Ed. 2d 20, 81 S. Ct. 6 (1960).

It is stated in *Atlantic & Gulf Stevedores v. Ellerman Lines*, 369 U.S. 355, 7 L. Ed. 2d 798, 82 S. Ct. 780, that the Supreme Court cannot "redetermine facts found by the Jury," and further, "where there is a view of the case that makes the jury's answers to the Special Interrogatories consistent, they must be resolved that way. For a search for one

possible view of the case which will make the jury's findings inconsistent, results in a collision with the Seventh Amendment." Respondent, as well as Petitioner, is entitled to the protection incident to a jury trial as guaranteed by the Seventh Amendment.

II. No federally created right under the Federal Employers' Liability Act was denied Petitioner by refusing Petitioner's requested Issues Numbers 1-A and 2-A, inquiring as to the negligence and proximate cause in "kicking cars on the occasion in question on a downgrade", because the Issues had been fully and fairly submitted to the Jury in other Issues to which no objections were made by Petitioner.

III. No federally created right under the Federal Employers' Liability Act was denied Petitioner by refusing Petitioner's requested Issues Numbers 3-A, 4-A and 5-A, inquiring as to whether Respondent was guilty of actionable negligence in "kicking cars" without first determining that J. T. Hullum was in a safe position aboard the car he was riding, because the Issues had been fully and fairly submitted to the Jury in other Issues to which no objections were made by Petitioner.

Although it is held in the case of *Brown v. Western Ry. of Alabama*, 338 U.S. 294, 94 L. Ed. 100, 70 S. Ct. 105 (1949) that federal rights cannot be defeated by the form of local practice—a holding with which we agree—the rule is equally well settled that in actions brought under the Federal Employers' Liability Act, the rules of practice and procedure

are governed by State laws. *Batton v. Atlantic Coast Line Ry. Co.*, 193 S.E. 674, Cert. Den., 303 U.S. 651, 82 L. Ed. 1112, 58 S.Ct. 750. The matters of admissibility of evidence,[4] submission of special issues,[5] examination of witnesses,[6] the Court's charge,[7] and other matters of procedure and practice, the State Court's rules obtain. There is no suggestion in the Act that, if Petitioner selects the State Court to enforce her substantive rights, the State Court may not submit the case in accordance with its practice and procedure if the federally created rights are preserved. In the case at bar there has been no subversion of federal rights as established by the Federal Employers' Liability Act. The record does not show that the local procedure followed has deprived Petitioner of a federally created right. The basis of her contention of such deprivation is that by the Court's failure to submit the issue requested, she failed to obtain a federal right accorded here by the Act. Such contention is unsound because there is no conflict between the submission of the case in the Texas Court under its procedural rules and those which would have obtained in a Federal Court. She was entitled to a jury determination of the ultimate issues plead and raised by the evidence. This is exactly what she obtained under the local procedure, and there are no over-exacting local requirements in the case at bar.

Petitioner alleged actionable negligence against Respondent in seven respects. (Tr. 10) However, reduced to con-

[4] St. Louis-San Francisco Ry. Co. v. King, Okla. (1954) 278 Pac. 2d 845

[5] Thompson v. Robbins, 157 Tex. 463, 304 S.W. 2d 111

[6] Atlanta Joint Term v. Knight, Ga. (1958) 106 2d 417

[7] Miller v. Norfolk Railway Company (1954) 83 S.E. 2d 533

trolling ultimate issues, Petitioner's claim was based upon Respondent's (a) failure to provide Petitioner's decedent a safe place in which to work and (b) failure to keep a proper lookout for Petitioner's decedent during a switching (kicking) operation. No other acts of negligence are alleged against Respondent. The Trial Court submitted to the jury five primary issues of negligence. (Tr. 40-42) Omitting subsidiary issues, the Court submitted the following issues relating to primary negligence:

(1) Failure to keep a proper lookout,

(2) Moving the string of cars at an excessive rate of speed during the kicking operation,

(3) Kicking the cars on the occasion in question,

(4) Kicking the cars harder than would have been kicked by ordinary prudent persons in the exercise of ordinary care under the same or similar circumstances; and

(5) Failure to furnish Petitioner's decedent with a reasonably safe place in which to work.

Appropriate definitions and explanatory instructions, to which no objection has been made, were given by the Trial Court. The jury failed to find any of the primary negligence issues in Petitioner's favor. The jury found that neither Petitioner's decedent nor Respondent was guilty of negligence on the occasion in question. Petitioner's complaint is that the Court,

in addition to the issues submitted, should have given additional issues as follows:

(1) Was it negligence to kick the cars on a down grade?

(2) Was Respondent's crew negligent in kicking the cars without first determining that J. T. Hullum was in a safe position aboard the car upon which he was riding?

In *Thompson v. Robins*, 157 Tex. 463, 304 S.W. 2d 111 (1957) in discussing the submission of special issues in a case arising under the Federal Employers Liability Act, the Court states as follows, at page 116 of the opinion:

> "Defendant agrees that this being a railroad employee personal injury case, contributory negligence was no defense, but contends that the principle of comparative negligence was applicable. This being its position, it further contends that the Federal Employers Liability Act, 45 U.S.C.A., supra, merely prescribes the substantive rights of the parties, and that all Federal Employers Liability Act cases are to be tried in accordance with our own Rules of Civil Procedure and not the Federal Civil Rules, 28 U.S.C.A. The Federal Employers Liability Act, 45 U.S.C.A., supra, as well as the Texas Act, Art. 6440, Vernon's Annotated Civil Statutes, both specifically provide that the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. We *agree with the Defendant that the Texas Rules of Civil Procedure control.* The Plaintiff invoked the jurisdiction of the State Courts and the case should be tried as any other suit for damages is tried in the State Courts so far as procedural matters are concerned."

Petitioner does not deny that the Texas Rules of Civil Procedure apply, but contends that the Trial Court should have, under Rule 277, Texas Rules of Civil Procedure, submitted additional special issues relating to proper lookout and alleged negligence in kicking the boxcars on the occasion in question. Petitioner takes the position that the Trial Court's failure to further fragmentize these issues and submit different shades and phases of the same ultimate issues deprived her of certain so-called "federally created rights." Petitioner cites no authorities in support of this proposition, and the cases cited by her are not in point but are concerned with sufficiency of evidence questions.

The relevant Rule here involved in Rule 279 of the Texas Rules of Civil Procedure.[8] The Rule is specific that where the Court has fairly submitted the controlling issues raised

[8] "When the Court submits a case upon special issues, he shall submit the controlling issues made by the written pleadings and the evidence, and, except in trespass to try title, statutory partition proceedings and other special proceedings in which the pleadings are specially defined by statutes or procedural rules, a party shall not be entitled to an affirmative submission of any issue in his behalf where such issue is raised only by a general denial and not by an affirmative written pleading on his part. Nothing herein shall change the burden of proof from what it would have been under a general denial. Where the Court has fairly submitted the controlling issues raised by such pleading and the evidence, the case shall not be reversed because of the failure to submit other and various phases or different shades of the same issue. Failure to submit an issue shall not be deemed a ground for reversal of the judgment, unless its submission, in substantially correct wording, has been requested in writing and tendered by the party complaining of the judgment; provided, however, that objection to such failure shall suffice in such respect if the issue is one relied upon by the opposing party. Failure to submit a definition or explanatory instruction shall not be deemed a ground for reversal of the judgment unless a substantially correct definition or explanatory instruction has been requested in writing and tendered by the party complaining of the judgment."

by the pleading and the evidence, the failure to submit other and various phases or different shades of the same issue does not present reversible error. Since the promulgation of the Texas Rules of Civil Procedure in 1941, the Appellate Courts of this State have admonished Trial Courts to submit to the jury, especially in negligence cases, *only the controlling issues and not to fragmentize* and submit different shades and phases of the same ultimate issues. An unnecessary splitting of an issue was one of the evils sought to be corrected by the Texas Rules of Civil Procedure.

The cases clearly hold that the Trial Courts are not required to submit requested issues which are substantially and sufficiently covered by the main charge. *Thomas v. Billingsley*, 173 S.W. 2d 199, (Err. ref.) Thus, it is held that the Trial Court is given much discretion in framing and submitting the controlling issues. *Dollie Adams Oil Corp. v. Cree*, 279 S.W. 2d 619 (No writ.).

In the case of *Dallas Railway & Terminal Company v. Straughan*, 254 S.W. 2d 882, no writ history, the Court of Civil Appeals held that it was not error to submit as contributory negligence in an automobile accident issues inquiring if the appellee was negligent in failing to apply the brakes of his automobile quicker than he actually did and if his failure to turn his automobile to the left immediately prior to the collision was negligence. In the case the Court submitted issues inquiring as to whether Appellee failed to keep a proper lookout and whether he was driving at excessive rate of speed under the existing circumstances. In holding that it was not error to refuse the

additional requested issues, the Court states that the trial court is not required to submit issues that are merely evidentiary or unnecessary and that it is never required to submit various phases or different shades of material issues submitted. The Court held that the Trial Court had submitted the "controlling issues" raised by the pleadings and the evidence. To the same effect, see *Gulf Oil Corp. v. Walker*, 288 S.W. 2d 173, (No writ); *McAllister v. Gardner*, 373 S.W. 2d 316 (NRE).

In *City of Fort Worth v. Lee*, (1945) 143 Tex. 551, 186 S.W. 2d 954, there was an action by the Guardian of a minor who was injured when his bicycle was driven off of the roadway and fell into a railroad cut. One of the defendants requested an issue inquiring whether in the exercise of ordinary care for his own safety Victor Atkins should have have discovered that he was off of the traveled portion of the street in time to have stopped his bicycle before going into the excavation. The Supreme Court held that the refusal of this issue was not error in view of the fact that the Trial Court did submit an issue inquiring as to whether Victor Atkins "after he rode his bicycle off of the traveled portion of the street, was negligent, as that term has been defined to you, in failing to stop his bicycle just prior to the accident in question." The requested issue was merely a phase or different shade of the issue submitted. Two submissions of the same issue are never required. *Little Rock Furniture Company v. Dunn*, (1949) 148 Tex. 197, 222 S.W. 2d 985.

In *Northwest Texas Motor Lines v. Hodges*, 138 Tex. 280, 158 S.W. 2d 487, the Supreme Court holds that certain requested special issues were properly refused because they were encompassed in other issues submitted by the Court. The petitioner complained because the Trial Court, upon proper request, refused to submit the question as to whether immediately prior to the collision, Hodges was operating his truck at such rate of speed that he could not stop it within the range of his vision. In another requested special issue the same inquired as to whether immediately prior to the collision Hodges failed to reduce the speed of his truck when meeting an automobile with blinding lights, approaching from the opposite direction. The Court held that the requested special issues related solely to the *manner* of Hodges' operation of his truck immediately prior to the collision — one, whether he was so operating it that he could not stop it within his range of vision, the other whether he failed to reduce his speed upon meeting the car with blinding lights. The Court states at Page 489:

> "It has never been the policy of the law to lengthen and complicate special issue charges by requiring Trial Courts to give issues that merely submit various phases or other shades of meaning of an issue already in the charge. It is required only that each controlling issue raised by the pleadings and the evidence be submitted *once* fairly, simply and succinctly. Otherwise, such charge could be drawn out to interminable length, confusing not alone to the jury but to the Court and counsel as well."

The Court held that the Trial Court, having submitted the question as to whether or not Hodges had his vehicle under "proper control", included the subject matter of the refused

requested special issues. This case is directly in point with the one at bar. See also *Smith & Conklin Bros. et al v. Griffith et al*, (1954), 153 Tex. 341, 268 S.W. 2d 124, wherein the Supreme Court of Texas again affirms the law that where the Court has fairly submitted the controlling issues raised by the pleadings and the evidence, it is not error to refuse to submit other requested special issues relating only to various shades of the issues submitted.

In *Pace Corp. v. Jackson*, 155 Tex. 179, 284 S.W. 2d 340, (1955) the Supreme Court held that where an issue had been submitted, which inquired whether the Pace Corporation failed and refused to supply Jackson with cigarettes for his vending machine business, it was not necessary to again submit an issue inquiring whether petitioners offered to supply cigarettes for the vending machine business. The Court held that one of the issues covered the other and the requested issue was merely a phase or shade of the other issue.

In *Prudential Insurance Company of America v. Tate*, (1961) 162 Tex. 369, 347 S.W. 2d 556, the Court states at Page 559 as follows:

> "We hold that the Trial Court did not err in refusing Petitioner's requested Special Issues Nos. 1 and 2. The matters inquired about were not ultimate issues as to liability of the insurance company. The Trial Court submitted the controlling issue on this phase of the case and was not required to submit other and various phases or different shades of that same issue. Rule 279 Texas Rules of Civil Procedure."

It was held in *Pipeline Workers Local No. 38 v. Zachry Company*, 276 S.W. 2d 876, NRE, that a refusal on the part of the Trial Court to submit a requested issue, the subject

matter of which was adequately covered by other issues submitted, was not error.

In *Cunningham et ux v. John Suggs*, C.C.A. (1960) 340 S.W. 2d 369, NRE, the Court had submitted an issue as to whether Suggs stopped his automobile upon the paved or main traveled part of the highway when it was "possible" to stop said vehicle off of the highway. The issue was answered favorably to Suggs. Appellant Cunningham complained because the Trial Court refused to submit to the jury requested special issues inquiring whether Suggs failed to drive his automobile completely off the paved portion of the highway, whether he could have, but failed to, drive his automobile onto the North shoulder of the highway, whether he could have, but failed to, drive his automobile onto the South shoulder of the highway, whether he stopped his automobile in such a position that it blocked the portion of the highway used by the traveling public, and whether he stopped his automobile upon the paved portion of the highway without leaving an unobstructed width of the highway for free passage of other vehicles thereon. The Court held that the matters inquired about in the requested special issues were phases and shades of and were covered by the issues which the Trial Court had submitted. The Court held there was no error in refusing the requested special issues.

In *Goolsbee v. Texas & N. O. Railway Company*, (1951) 150 Tex. 528, 243 S.W. 2d 386, the complaint was made that the Trial Court erred in refusing to submit certain requested issues inquiring as to whether Goolsbee had such apprehension as to lose his power to act voluntarily and deliberately

and further inquiring whether the act of Goolsbee in jumping from his engine was a voluntary one. The Court held this was not error because the subject matter of the requested special issues had been submitted in another issue inquiring whether Goolsbee had acted in an emergency on the occasion.

In *Neyland et al v. Passano*, C.C.A. (1961) 352 S.W. 2d 367, NRE, the Court had submitted an issue as to whether a driver whose automobile struck a small child failed to apply brakes properly. In addition to this issue the Appellant requested an issue as to whether the driver had failed to slacken the speed of the automobile being driven by her. The Court held that the refusal of the Trial Court to submit such an issue was not error because the controlling ultimate issue had been submitted, and that the Trial Court was not required to submit other phases or shades of the same issue, citing Rule 279, T.R.C.P.

To the same effect, see *Blaugrund v. Gish*, 142 Tex. 379, 179 S.W. 2d 266; *Triangle Cab Company v. Taylor*, 144 Tex. 569, 192 S.W. 2d 143; *Dallas Railway & Terminal Company v. Strickland Transportation Company*, C.C.A., 225 S.W. 2d 901, (No writ). In the last case cited the Trial Court was requested to submit a special issue inquiring as to whether the driver of Appellee's truck failed to slow down before entering the intersection at the time and on the occasion in question. The Trial Court had submitted an issue as to whether the truck driver failed to check his speed as he approached the street car track, and whether the truck driver

increased the speed of his truck as he attempted to cross the intersection. The Court held that there was no error in refusing Appellant's requested issue inasmuch as the issues submitted covered substantially the same questions involved in the requested special issue.

See also *Camco Inc. v. Evans*, 377 S.W. 2d 703, (Tex. Civ. App., 1963, Ref. NRE); *Texas & Pacific Ry. Co. v. Snider*, 159 T380, 321 S.W. 2d 280.

In the Case of *Texas & N. O. Ry. Co. v. Pool*, 263 S.W. 2d 582 (No writ), an F.E.L.A. case, the whole basis of the Plaintiff's complaint was that the Defendant was negligent in permitting oil and grease to accumulate upon the end of a cross tie. Although this constituted only one ultimate ground of recovery, the trial court submitted various issues, many of them evidentiary, relating to the negligence of the defendant railroad carrier in permitting the cross tie to become covered with grease. The Court of Civil Appeals held this was error, constituted a multiple submission of Plaintiff's theory of recovery. The case was reversed because of such multiple submission of one ultimate ground of recovery. See also *Crowell-Gifford Furniture Company v. Cloutman*, C.C.A. 276 S.W. 2d 539, N.R.E. Many other authorities to the same effect are collated in Vol. 36A, *Texas Digest*, Section 35 (5) *Trial.*

In the case at bar did the Trial Court fairly submit the *controlling issues* raised by Petitioner's pleading and the evidence? Were the requested issues of the Petitioner mere phases or different shades of the issues that had been fairly submitted by the Court?

Omitting the subsidiary issues as to negligence and proximate cause, the Petitioner requested the Trial Court to submit the additional issues:

> "1A. Do you find from a preponderance of the evidence that kicking of the cars on the occasion in question on a downgrade was negligence?" and
>
> "3A. Do you find from a preponderance of the evidence that the defendant's crew on the occasion in question kicked the cars in question without first determining that J. T. Hullum was in a safe position aboard the car he was riding?"

It is clearly shown by the record that *both* the above requested issues were clearly covered in other issues submitted by the Trial Court.

With reference to the "kicking" operation, the following special issues were submitted:

> "3. Do you find from a preponderance of the evidence that the defendant's switching crew, immediately before the occurrence in question, moved the cars they were switching at a speed in excess of that at which a person of ordinary prudence in the exercise of ordinary care would have moved the cars under the same or similar circumstances?
>
> "5. Do you find from a preponderance of the evidence that the kicking of the cars on the occasion in question was negligence?
>
> "7. Do you find from a preponderance of the evidence that on the occasion in question the cars in question were kicked harder than they would have been kicked by an ordinary prudent person in the exercise of ordinary care under the same or similar circumstances?"

It is obvious that the above three special issues relating to the *manner* of the kicking operation substantially covered the requested special issues as to whether the kicking of the cars on the occasion in question on a downgrade was negligence. It was undisputed, and the evidence from all the witnesses indicated, that the Tyler Yards are on a slight downgrade. No point or issue was made as to whether the contrary fact existed. The Court, therefore, with reference to the manner of the kicking of the cars, gave the Petitioner three "bites at the apple", namely, whether the cars were being kicked too fast, whether they were being kicked too hard, and the global submission of Special Issue No. 5 as to whether the kicking of the cars on the occasion in question was negligence. (Tr. 41) It occurs to us that if the Court had submitted no issue other than Special Issue No. 5, the Petitioner would have no complaint here. Certainly, such was a global submission, completely covering generally the *manner* in which the cars were being kicked on the occasion in question. It is obvious from a mere reading of the requested issues that the subject matter of the requested issues was covered in the issues submitted.

With reference to the requested issue of Petitioner as to whether the defendant's crew on the occasion in question, kicked the cars in question without first determining that J. T. Hullum was in a safe position aboard the car he was riding, the Trial Court did submit a special issue inquiring as to whether the other members of defendant's switching crew failed to keep a proper lookout for J. T. Hullum on the occasion in question. (Special

Issue No. 1—Tr. 40) Accompanying this issue was a definition of the term "proper lookout", which was not objected to by Petitioner. In addition, the Trial Court submitted Special Issue No. 9 inquiring as to whether, on the occasion in question, the Defendant failed to provide J. T. Hullum with a reasonably safe place in which to work. This term likewise was defined by the Court without objection from Petitioner. (Tr. 42) Therefore, the requested Special Issue No. 3A of which complaint is here made, was nothing more than a lookout issue which had been more or less globally submitted in Special Issue No. 1 aforesaid. It might be pointed out that Special Issue No. 1 encompassed the lookout of every member of defendant's switching crew other than J. T. Hullum. Therefore, it occurs to us that Petitioner is requesting only that other phases and different shades of the same ultimate grounds of recovery be submitted. The two main grounds of recovery here were, first, whether the defendant's crew kept a proper lookout for J. T. Hullum's safety during the kicking operation and, second, whether the manner of the kicking of the cars on the occasion in question was negligence. These were amply covered by the issues submitted and we submit that it would have been error for the Court to have further fragmentized these issues. The Supreme Court of Texas, in *Traywick v. Goodrich*, (1963) 364 S.W. 2d 190, held specifically that the issue of lookout should not be fragmentized. One issue in that case inquired as to whether Mrs. Etheridge failed to maintain a proper lookout. The Trial Court submitted another issue inquiring as to whether Mrs. Etheridge failed to ascertain or determine that the way was clear for her to enter the intersection before doing so. The Court

held that the second issue should not have been submitted as it was necessary to submit only one issue on proper lookout. We have the same situation now before this Court. The Trial Court having submitted properly, without objection, an issue as to whether the defendant's crew maintained a proper lookout for J. T. Hullum, it was not required to submit another phase or different shade of the same issue by inquiring as to whether the defendant's crew kicked the cars in question without first determining that J. T. Hullum was in a safe position aboard the car he was riding. If Defendant's crew failed to keep a proper lookout, it certainly failed to first determine that J. T. Hullum was in a safe position aboard the car he was riding before they kicked the cars. Moreover, it can be fairly said that the issue was covered also in Special Issue No. 5 submitted by the Court.

If this cause had been tried in a Federal District Court, it would have been submitted to the jury under Rule 49, Federal Rules of Civil Procedure. In such event the Trial Court would have broad discretion as to the manner in which the Interrogatories were submitted. *DeEugenio v. Allis-Chalmers Mfg. Co.*, 210 Fed. 2d 409; *R. H. Baker & Co. v. Smith-Blair*, 331 Fed 2d 506, 9th Cir. (1964); *Employers Mutual Casualty Company v. Johnson*, 210 Fed. 2d 153, 5th Cir. As stated in *Scott v. Isbrandtsen Co., Inc.*, 327 Fed. 2d 113, (1964) 4th Cir., "A Federal Court has discretion in the use of special verdicts and this discretion is not limited to the decision with respect to such use but extends beyond to the form of the submitted interrogatories

once such decision is made." To the same effect, *McDonnell v. Timmerman*, 269 Fed. 2d 54, (1959) 8th Cir.; *Travelers Ins. Co. v. Truitt*, 280 Fed. 2d 784 (1960) 5th Cir. "Where the Court does determine to use special verdicts or written interrogatories to accompany a general verdict, it has a similar discretion as to the nature, scope and form of the questions to be put to the jury." 2B, Barron & Holtzoff, *Federal Practice & Procedure*. (Page 337)

It follows that, under the Texas procedure, Petitioner probably obtained the submission of *more* issues than she would have obtained under the Federal Rules had the case been tried in the Federal District Court. The Trial Court gave her a fair submission of every ultimate ground of recovery and Petitioner has shown no deprivation of federal rights in the manner of submission.

At Page 24 of the Petition, the case of *Arnold v. Panhandle and Santa Fe Ry Co.*, 353 U.S. 360, 1 Law Ed. 2d 889, 77 Sup. Ct. 840 (1957) is cited. The Court held in that case merely that certain specific findings of a jury did not necessarily conflict with the jury's finding of actionable negligence against the Railroad and that the Petitioner had shown negligence against the carrier. That question is not involved in the case at bar because Respondent has been exonerated by *all* findings of the jury. Petitioner did not obtain favorable findings, either specific or general, as to primary negligence on the part of the Respondent.

At Page 25 of the Petition, there is cited the case of *McAllister v. Magnolia Petroleum Company*, 357 U.S. 221, 78 S. Ct. 1201, which case held merely that a State Court

may not apply its two year statute of limitation to bar an unseaworthiness action that is joined with an action for negligence under the Jones Act. This case likewise has nothing to do with Petitioner's contentions in the case at bar. Finally, Petitioner cites the case of *Bailey v. Central Vermont Ry. Co.*, 319 U.S. 350, 87 Law Ed. 1444, 63 S. Ct. 1062. This Honorable Court, in the *Bailey* case, reversed the Supreme Court of Vermont, which had set aside a jury verdict for the Plaintiff. The case holds that the jury verdict for the plaintiff was supported by sufficient evidence. That situation does not exist in the case at bar.

Petitioner has cited to the Court no case holding that a failure to fragmentize special issues in a case tried in State Court is a denial of any federally created right under the Federal Employers' Liability Act. We suggest that Petitioner can find no case so holding.

IV. The refusal of Petitioner's Specially Requested Instruction No. 2, reading as follows:

> **"You are further instructed that the Defendant Railroad is under a continuing, non-delegable duty to provide its employees, including the Plaintiff's decedent, J. T. Hullum, with a reasonable (sic) safe place within which to work."**

was not a denial of a federally created right under the Federal Employers' Liability Act because such an Instruction was not necessary to enable the jury to pass upon the Issues submitted.

Petitioner alleged in the Amended Petition actionable negligence against Respondent, inter alia, "in failing on the

occasion in question to furnish the decedent, J. T. Hullum, with a safe place in which to work". (Tr. 10) The Trial Court submitted to the jury, without objection by Petitioner, an issue covering such allegation, together with a definition of the terms used therein.[9] (Tr. 42)

Petitioner requested of the Trial Court the additional instruction contained in specially requested Instruction No. 2, as follows: "You are further instructed that the defendant railroad is under a continuing non-delegable duty to provide its employees, including the plaintiff's decedent, J. T. Hullum, with a reasonable safe place in which to work."

There was no evidence presented that on the day of the injury to J. T. Hullum there had been any change in the instrumentalities with which the switching crew performed their duties or in the location of the place where the work was performed or in the personnel composing the crew of which the decedent was a member. Moreover, there is no evidence in the record of the presence of any party or person other than the switching crew members, and there is no evidence that the injury was caused by any act or omission of a third party disassociated from the crew.

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[9] — SPECIAL ISSUE NO. 9

"Do you find from a preponderance of the evidence that on the occasion in question, December 13, 1961, the defendant failed to provide J. T. Hullum, deceased, with a reasonably safe place in which to work?

"You are instructed that by the term 'reasonably safe place in which to work', as used herein, is meant such a place with regard to safety of its employees as would be furnished by an ordinary prudent employer in the exercise of ordinary care under the same or similar circumstances."

Rule 277, Texas Rules of Civil Procedure, was promulgated in 1941, and was taken from Article 2189, Revised Civil Statutes of Texas. The relevant part of the Rule reads:

> "In submitting Special Issues, the Court shall submit such explanatory instruction and such definitions of legal terms as shall be necessary to enable the jury to properly pass upon and render a verdict on such Issues. * * *".

The Rule also added to the language of the Statute, the following clause, "and in such instances the charge shall not be subject to the objection that it is a general charge." It is clear, therefore, that the effect of the changes in the Rule would permit, *where required*, explanatory instructions without the same being objectionable as general charges. The Rule does not authorize and has never been construed as authorizing a general charge to the jury as distinguished from special issue submission. As stated in *Vega v. Grieger*, (1954), 264 S.W. 2d 498, reversed on other grounds, 271 S.W. 2d 85, "Rule 277, supra, authorizes the submission of the cause on special issues and in instances on a general charge, but it does not authorize such submission on both methods at the same time."

It is likewise clear that general instructions are never permitted unless the submission of the same is *necessary* to enable the jury to properly pass upon and render a verdict upon the issues. It has been held that such language in the Rule allows the Trial Judge some choice of method with reference to the submission of a theory of recovery

or defense. The Rule affords a *greater latitude* to the Trial Judge than did the Statute. *Viduarri v. Bruni*, 179 S.W. 2d 818 (Ref. wm.)

> "The term 'explanatory instructions' in the Rule (Rule 277) smacks of a broader meaning than the word 'explanations' and that view is well confirmed by the last clause of the above quoted language from said Rule. This clause will permit explanatory instructions even in the nature of general charges whenever there is good need for same to properly aid the jury. In my opinion, however, this does not license an unlimited use of general charges in a special issue case."[10]

It is apparent that the only reason explanatory instructions are *ever* given in connection with a special issue is to *enable the jury to properly pass upon* the issues. There is no license to give the jury abstract legal instructions with which the jury is not concerned and which cannot serve as a guide in answering the issues. Therefore, in appraising the action of the Trial Court in refusing Petitioner's requested Special Instruction No. 2, the test to be applied is whether such instruction *enabled the jury* to understand and pass upon the issue. Such additional instruction was not necessary because the same was nothing more than the statement of the law with which the jury was not concerned. The instruction did not furnish a guide for any term or phrase used in the issue. It was wholly immaterial whether the Respondent's duty was a "continuing" one or whether the same was "non-delegable" insofar as enabling the jury to answer the inquiries since it furnished no definition of any legal term used in the issues. The jury had before it

[10] Justice Dooley, writing in 20 *Texas Law Review* 32 at Page 36.

a proper definition of "reasonably safe place in which to work" (not objected to by Petitioner) and there was no necessity for the jury to have any further instruction in order to answer the issue. The portion of the requested definitions, "continuing, non-delegable", were simply not material to the issue. There is no evidence in the record that Respondent had attempted to delegate to anyone its duty of furnishing to Petitioner's decedent a reasonably safe place in which to work.

It is not the province of the jury to pass upon the law and in most instances, it is unnecessary that the jury be charged upon abstract propositions of law. It is never proper under special issue submission for a Trial Court to advise the jury of all of the law in connection with a case and at most the law should not be given to the jury except as a guide to enable the jury to reach an answer. Therefore, in determining whether the Respondent, as an ordinary prudent employer, exercised ordinary care in furnishing a reasonably safe place for Petitioner's decedent, J. T. Hullum, to work on the occasion in question, it certainly was not necessary, or even proper, for the jury to know whether the employer's duty was a "continuing" and "non-delegable" one. The instruction could not have aided the jury.

The cases in Texas are clear on this question and fully support the action of the Trial Court in refusing such requested instruction. The leading cases on the interpretation of Rule 277 is *Boaz v. Whites Auto Stores*, (1943)

141 Tex. 366, 172 S.W. 2d 481. The Court, at Page 484, states as follows:

> "The precise question here for decision is whether such change was made by Rule 277, Texas Rules of Civil Procedure, as would authorize the giving of such instruction. The language of Rule 277 bearing upon the particular question for decision is as follows: '* * * In submitting special issues the Court shall submit such explanatory instructions and such definitions of legal terms as shall be necessary to enable the jury to properly pass upon and render a verdict on such issues, and in such instances the charge shall not be subject to the objection that it is a general charge * * *'
>
> "By comparing this language with that of the statute, Art. 2189, it will be observed that in the rule the words 'explanatory instructions' are substituted for the word 'explanations'. Clearly the rule affords a greater latitude to the trial judge than did the statute, and instructions are now permissible which formerly would have been condemned. However, the rule does not authorize the giving of an instruction which is not 'necessary to enable the jury to properly pass upon and render a verdict on such issues'; and which is calculated to prejudice one of the parties before the jury."

Generally, the Courts have held that instructions giving the *responsibilities* and *duties* of the parties to an action are not authorized under Rule 277 and should not be given. In *Panhandle & Santa Fe Railway Company v. Walker*, (1963) 364 S.W. 2d 438, NRE, the Appellant complained of the refusal of the Court to give the following requested charge to the jury:

> "You are instructed that defendant, Panhandle & Santa Fe Railroad Company owed no duty to plaintiff, an employee of Kellogg Construction Company, to furnish

> him flags or other warning devices, or to place same on or about cars in which plaintiff might be working; its only duty was to exercise ordinary care under the facts and circumstances then existing."

The Court held that such refusal did not constitute reversible error, citing numerous authorities.

In *Texas Bus Lines v. Whatley*, 210 S.W. 2d 626, NRE, (1948), an automobile collision case, complaint was made of the refusal of the Trial Court to give the following special instruction:

> "As between defendant, Texas Bus Lines, and the Defendant Ellision, the driver of the bus owed no greater duty to protect plaintiff, Mrs. Whatley, than did the defendant Ellison."

The Court approved the refusal of this instruction, stating that the requested charge was a general one and the Court did not believe that the requested charge was necessary to enable the jury to properly pass upon the issues.

In *Tripp v. Watson*, 235 S.W. 2d 677, NRE (1950) the requested special instruction, refused by the Trial Court, was as follows:

> "You are instructed that Art. 6687b, Sections 2, 7 and 9, Revised Civil Statutes of Texas (Vernon's Ann. Civ. St. Art. 6687b, Sections 2, 7 and 9) prohibit the operation of passenger or commercial vehicles upon the highways of this State by any person unless such person has the valid license an operator, commercial operator or chauffeur. You are further instructed that Art. 6687b, Revised Civil Statutes of Texas, requires an applicant for an operator's, commercial operator's, or chauffeur's license to successfully pass an examination prior to the issuance of a license."

The Appellate Court held that the requested instruction was not one which would have aided the jury in answering any of the issues submitted to it, nor was it a definition of any term contained in the charge.

In *Mosby v. T & P Railway Co.*, 191 S.W. 2d 55 (1945) (no writ), the Appellant railroad requested the following special instruction.

> "A railway company is not to be regarded as an insuror of the safety of its employees, but it is compelled to use ordinary care in providing reasonably safe and proper equipment, appliances and places where its employees can follow their vocation."

In condemning such a requested instruction, the Court held that although the same is not to be condemned as a general charge under Rule 277, such instruction was not necessary to enable the jury to properly pass upon and render a verdict on the issues. We submit that this case is directly in point and that the special instruction requested by Petitioner in the case at bar is no more necessary than the one condemned in the cited case. The Court, in *Gonzales v. Orsak*, 205 S.W. 2d 793 (1947) (no writ) held as reversible error the giving of the following special instruction:

> "It is the duty of the driver, rider, or operator of a vehicle about to be overtaken and passed to give way to the right in favor of the overtaking vehicle on suitable and audible signal given by or on behalf of the operator, driver, or other person in charge and control of such overtaking vehicle if such overtaking vehicle be a motor vehicle."

While the Court stated that there were no pleadings justifying such an issue, under Rule 277, the Court should only

submit explanatory instructions as *shall be necessary* to enable the jury to properly pass upon and render a verdict on the issues. As given, the instructions constituted error.

Other examples of instructions properly refused: An instruction that a dog is a domesticated animal and that the owner or person in control of such domesticated animal has no responsibility or duty imposed upon him, under the law, to confine or restrain such dog unless such dog is of such vicious nature as would cause him to stray from the premises, etc. *Dakan v. Humphreys*, 190 S.W. 2d 371 (1945) (No writ); an instruction to the effect that a Reclamation District, through its Board of Directors, had the exclusive power to determine the necessity or convenience of taking a person's property, except where the exercise of such power involves a clear abuse of discretion. *Brazos River C. and Reclamation Dist. v. Harmon*, 178 S.W. 2d 281 (1944) Ref. wm.

A case directly in point clearly upholding the refusal of Petitioner's requested instruction, is *Guthrie v. Sinclair Refining Company*, 320 S.W. 396 (1959) NRE, Cert. den., 4 Law Ed. 2d 120. This was an action brought under the Jones Act[11] for personal injuries sustained when the plaintiff stepped upon a short length of line which lay on the lower deck level of a ship. The Trial Court submitted negligence in the form of asking the following Issue: "Do you find

[11]—46 U.S.C.A., Section 688. This Section extends to any seaman who suffers personal injury in the course of his employment a cause of action identical with the rights and remedies of railway employees under the Federal Employers Liability Act, Section 51, et seq.

that at, and immediately prior to, the time Eugene D. Guthrie suffered injury, if any, the presence of the line, if any, made that part of the deck where it lay not a reasonably safe place to work?" In connection with this special issue, the Court gave the following instruction: "By the term 'reasonably safe place to work' is meant a place in which the work to be carried on can be done with reasonable safety".

The plaintiff requested an issue as follows: "Do you find from a preponderance of the evidence that defendant failed to furnish to Eugene D. Guthrie at the time, and on the occasion of his injury, if any, a reasonably safe place in which to work?" In connection with the plaintiff's requested issue, he also requested an explanatory instruction making clear the federal law as to the distinction between the "absolute" and "non-delegable" duty of the employer and the duty of ordinary care imposed upon the employer. The Court held that the requested instruction in connection with plaintiff's requested issue was an instruction on the law, with which the jury was not concerned and that its refusal was proper. The Court stated that the instruction requested in connection with the requested issue *was not necessary* to enable the jury to properly pass upon and answer the issue relative to a safe place in which to work. The Court stated that had the Court given such instructions, the same would have been improper and error.

We submit that this case is directly in point and makes it clear that the Trial Court in the case at bar was correct in refusing Petitioner's requested Special Instruction No. 2!

A closely analogous case is found in *Robinson v. Gulf, Colorado & Santa Fe Railway Co.*, (1959) 325 S.W. 2d 432, err. ref., cert. den., 80 Sup. Ct. 672, 362 U.S. 919, 4 Law Ed. 2d 739. Suit was brought under the Act for damages for the death of an employee of the defendant carrier. Numerous special issues were submitted inquiring as to specific acts of negligence. The Trial Court refused a specially requested issue inquiring as to whether the defendant failed to provide the decedent with a safe place to work. The Appellate Court held that the specific issue submitted included all of the grounds upon which a finding of unsafe place to work could be based. In the case at bar, of course, in addition to the specific acts of negligence submitted by the Court, there was also submitted Special Issue No. 9, which was a global submission or a general submission of that issue. (Tr. 42) The important holding in the *Robinson* case, however, is that even if it was error for the Trial Court to have failed to submit the issue of unsafe place to work, the error was of such nature that it "probably did not cause the rendition of an improper judgment" as contemplated by Rules 434 and 503, Texas Rules of Civil Procedure. In the case at bar, of course, it is strongly evident that there is no harm inasmuch as the Trial Court gave not only the global form of submission, but also the specific issues.

On the point under consideration, we conclude with the citation of *Archey v. Nederlandsch-Amerikaansche Stoom Maat.*, 354 S.W. 2d 688, cert. den., 9 Law Ed. 2d 236, 371

U.S. 929, 83 Sup. Ct. 299. This action arose under the Jones Act and was an action for damages brought by a stevedore injured while storing cargo in a wharfed vessel. A take nothing judgment was rendered. The complaint upon appeal was directed to the Trial Court's action in refusing to instruct the jury as follows:

> "You are instructed that the applicable law imposes an absolute duty upon Defendant to furnish dunnage in the hatch where it was to be used that was reasonably suitable for the purpose of stowing the steel drums with safety. Defendant cannot delegate such duty to any stevedoring company nor can it contract such duty away to any other party."

In affirming the Trial Court's judgment, the Court held that the requested instruction was not, under Rule 277, necessary to enable the jury to pass upon and render a verdict upon the issues. Instructions in the nature of a general charge are exceptional, and are to be given *only* when the necessity therefor exists. At page 692 of the Court's opinion, the Court states:

> "How knowledge of the legal obligation of Holland-America Line's non-delegable duty to furnish suitable dunnage would have aided the jury in determining from the facts before it that the dunnage used was or was not a proximate cause of Archey's injury is not apparent."

That statement is directly applicable to the case at bar and fully sustains our contentions that Petitioner was denied no federally created right by the refusal of the additional charge on the law.

V. The Trial Court's submission to the Jury of an issue on unavoidable accident and the Appellate Court's refusal to set aside the jury's findings thereon did not deny to Petitioner any federally created right.

a. Petitioner has not properly preserved alleged error in regard to the submission of such Issue inasmuch as Petitioner objected only upon the ground that the same was a double submission of other issues and enlarged her burden of proof.

b. If the point had been properly preserved, the submission of the Issue was proper because it placed no onerous burden upon the Petitioner and, inasmuch as Petitioner did not procure a finding of actionable negligence against Respondent, the finding of the jury on unavoidable accident is immaterial.

Preliminarily, we wish to point out that Petitioner's claim that the submission of an Issue on unavoidable accident deprived her of a federally created right is being raised for the first time in her Petition for Certiorari. Petitioner did object to the submission of Special Issue No. 20 (unavoidable accident) on the ground that it was a double submission of other issues in the case, thereby increasing Petitioner's burden of proof. (See Paragraph X, APPENDIX "N", Pet. for Cert.) There was no attempt on her part to demonstrate that by submitting the issue, she was deprived of a federally created right. We submit that the point has not been properly preserved. *Atlantic Coast Line Ry. Co. v. Mims*, 242 U.S. 532, 61 L. Ed. 476. Be that as it may, however, Petitioner's complaint regarding the submission of this issue is purely academic. The jury found that there was

no negligence on the part of the Respondent and the finding of unavoidable accident was immaterial under the facts of this case. If Petitioner had met her burden of establishing primary negligence on the part of Respondent, she, at the same time, with no additional burden, would have established that it was not an unavoidable accident. The very definition of unavoidable accident demonstrates this. Therefore, there was no onerous burden placed upon Petitioner and no federally created right has been denied her. Moreover, the submission of the issue was proper because, under the testimony of the Decedent, J. T. Hullum, unavoidable accident was clearly raised. (S.F. 209, 469)

VI. No federally created right was denied Petitioner by admitting into evidence (a) a conversation between Respondent's Engine Foreman, W. B. Bradley, and Petitioner's decedent, J. T. Hullum, and (b) motion pictures demonstrating to the Jury the type of "kicking operations" used in the Tyler Yards, because the evidence, under Federal as well as Texas Court Decisions, is clearly competent and admissible under the facts of this case.

W. B. Bradley, who was a member of the switching crew on the occasion in question, was not a party to this lawsuit. His deposition had been taken by Petitioner and a portion of the deposition was offered by her upon the presentation of its main case. Thereafter, Respondent offered certain portions of this deposition. The part of which complaint is now made is that portion covering a conversation Mr. W. B. Bradley had with the deceased, J. T. Hullum, while

the latter was in the hospital in Tyler. The portion of the conversation to which objection is made is as follows:

> "Q. Did he (J. T. Hullum) tell you anything about what had happened?
>
> "A. No, sir. Other than he said he didn't hold any member of the crew responsible or feel any ill feeling toward any member of the crew about the accident." (S.F. 209)

Petitioner objects to this on the grounds that it was a self serving declaration on the part of the witness, Bradley, the same was hearsay, and was a conclusion. Petitioner also made reference to the Dead Man's Statute but it is not clear that he made that additional objection to the proffered testimony.

If we correctly understand Petitioner's Point, he objected to the testimony on the grounds that it was hearsay, a conclusion on the part of the declarant, and in contravention of the Dead Man's Statute, Art. 3716, R.C.S. Texas.

The point is not well taken because such a statement by Mr. Hullum to the witness, Bradley, was admissible as an Admission and, as such, constitutes a well recognized exception to the hearsay rule. Admissions are to be distinguished from declarations against interests. Admissions are received as original evidence against the party making them. They constitute an exception to the hearsay rule, and must come from a party in interest or his agent or predecessor, whereas a declaration against interest may come from anyone. McCormick & Ray, *Texas Law of Evidence*, Vol. 2, Page 21. The statement made by J. T. Hullum

to Bradley was admissible against Petitioner because the Petitioner stood in the shoes of J. T. Hullum. If J. T. Hullum could not have recovered in this case had he lived, certainly the Petitioner could not recover. J. T. Hullum was the predecessor of Petitioner and the testimony is clearly admissible against Petitioner.

In *McLean v. Hargrove*, 139 Tex. 236, 162 S.W. 2d 954, (1942), it is stated that the rule in Texas is that Admissions, declarations or statements made by a person against his interests are admissible against him *or those claiming under him.* In *Hupp et al v. Hupp*, 235 S.W. 2d 753, NRE, the Court held that statements made by a deceased against his interests to third persons during his lifetime were admissible against those claiming under him.

This same type of evidence was held admissible in *Lubbering, Administratrix, v. N. O. Ellison, Jr.*, 342 S.W. 2d 796 (No writ) (1961).

Nor is there any merit in Petitioner's contention that the testimony was inadmissible because the same was a conclusion. The law is well settled that a party's admissions are *in no way limited by the opinion rule.* McCormick & Ray, in Vol. 2, *Texas Law of Evidence*, at Page 23, state as follows:

> "This is clearly supported by every day practice in our courts, where statements made by a party that he was 'at fault', 'in the wrong', and like inferential conclusions are customarily received in evidence against him without question. *The opinion-rule is a rule designed to regulate the examination of witnesses on the stand,* so as to receive from them as far as practicable concrete descriptions, rather than opinions which describe

> less definitely the facts inquired about. Obviously, this policy can have no application to the question of admitting statements made out of court, for such statements may be of great value as evidence, whether or not they happen to be what would be called in the courthouse 'facts', meaning the most concrete description of the situation, or 'opinion', meaning a less concrete statement."

An almost identical situation was presented in *Hovey et al v. See et al*, 191 S.W. 606, No writ. In that case, the surviving widow brought suit for the death of her husband, who was a locomotive engineer for the Kansas City, Mexico & Orient Railway Company of Texas. Briefly, the fatal injuries were received when the Plaintiff's decedent had operated a passenger train into San Angelo, Texas. He noticed the engine he had operated attached to an outgoing north bound passenger train. He went over to it and was inspecting it while it was in a stopped position. Another engine on a parallel track struck the engineer, injuring him, and resulting in his death. *On the way to the hospital*, the engineer stated to Witness Robinson *that he did not blame anybody* for the accident; that it was caused simply because he, the deceased, stood up there and let an engine run over him.

The Trial Court excluded this testimony, but the Appellate Court reversed the case for such exclusion and *held that the evidence* was admissible on two theories, first, res gestae, and second, *as an admission*. The Court further held that such testimony was not opinion testimony, but was a statement of fact from the decedent to the effect that no one else was responsible for the accident.

This case is directly in point and effectively answers Petitioner's contentions in this case. A portion of the Opinion is here reproduced:

> "If the proposed testimony was either res gestae, or would have been against the interest of the party making the statement, then it was admissible, and its exclusion error. See *I. & G.N. RR. Co. v. Anderson*, 82 Tex. 516, 17 S.W. 1039, 27 Am. St. Rep. 902; *Smith v. I & G.N. RR. Co.*, 34 Tex. Civ. App. 209, 78 S.W. 556; *Georgia RR. & Banking Co. v. Fitzgerald*, 108 Ga. 507, 34 S.E. 317, 49 L.R.A. 175; *Walker v. Brantner*, 59 Kan. 117, 52 Pac. 81, 68 Am. St. Rep. 344; *Hughes v. Delaware & H. Canal Co.*, 176 Pa. 254, 35 Atl. 190; *Holman v. Boston Land & Security Co.*, 20 Colo. 7, 36 Pac. 797; *Lord v. Refining Co.*, 12 Colo. 390, 21 Pac. 148; *Eastman v. Bennett*, 6 Wis. 232; *Dreher v. Town of Fitchburg*, 22 Wis. 675, 99 Am. Dec. 91; *Gulzoni v. Tyler*, 64 Cal. 334, 30 Pac. 981; *Helman v. Pittsburg etc Ry. Co.*, 58 Ohio St. 400, 50 N.E. 986, 41 L.R.A. 860; *Southern Ry. Co. v. Cochran*, 42 South. 100; *Williams v. Norton Bros.*, 81 Vt. 1, 69 Atl. 146; *Brown v. Stutson*, 100 Mich. 574, 59 N.W. 238, 43 Am. St. Rep. 462; *Pead v. Trull*, 173 Mass. 450, 53 N.E. 902; *Hurlburt v. Hurlburt*, 128 N.Y. 420, 28 N.E. 651, 26 Am. St. Rep. 482; *Haynes v. Trenton*, 123 Mo. 326, 27 S.W. 622; 1 R.C.L. p. 502, par. 43; 4 Chamberlayne, Modern Law of Evid. Section 2773; 1 Greenleaf, Evid. (16th Ed.) Sects. 147-150; 2 Jones' Commentaries on Evid. 390; 6 Thompson, Neg. Sect. 7738; 2 Wigmore, Evid., Sect. 1455 et seq.
>
> "(2) The writer is inclined to believe that for the both reasons its rejection was error, but, since the court is in accord with the view that it was admissible as a statement against interest, it is not necessary to pass upon the question as to whether it was admissible as res gestae."

* * * * *

> "Besides this, the declaration in question went further than that of either of the other witnesses, in that the declarant stated *that he did not blame anybody for the accident*, thereby in effect saying that he absolved any other party from blame; and it was not a matter of opinion, because he knew whether or not anybody was to blame for the accident. We therefore sustain this assignment, and hold that the Court erred in excluding the testimony."

This rule has been adopted in Texas and the above quoted text is found and affirmed in *Taylor v. Owen*, 290 S.W. 2d 771, (1956) NRE. In the *Taylor* case the defendant had made a prior admission that plaintiff "was not at fault in any way". This statement was admitted as an Admission against the defendant.

In *Farrand v. Houston & TCR Co.*, 205 S.W. 845, err. dism., a Plaintiff was suing for personal injuries and the defendant offered evidence that soon after the injury the plaintiff stated that it was his fault and that he blamed no one. The Court held such testimony was admissible.

With reference to such testimony being a conclusion, the Court in the *Farrand* case stated as follows at Page 848:

> "The main objective below, and the only one insisted upon here, is that it amounted to a mere conclusion and not the statement of any fact. With this deduction, however, we are not inclined to agree, but rather think, in the light of all the facts and circumstances present here, the same thing might be said of this boy as was said of the engineer in *Hovey, Receiver v. See*, 191 S.W. 606: The declarant stated that he did not blame anybody for the accident, thereby, in effect, saying that he absolved any other party from blame; and it was not a matter of opinion, because he knew whether or not anybody was to blame for the accident."

Finally, Petitioner says that the testimony was in contravention of the Dead Man's Statute, Art. 3716, aforesaid. Even if the Dead Man's Statute were applicable in this situation, (and it is not) the same does not apply to officers, agents, or employees of a party corporation. *Pruett v. First National Bank of Temple*, 175 S.W. 2d 648, (no writ); *Daughters of Tabor v. Fridia*, 91 S.W. 2d 404 (no writ); *Chastain v. Texas Christian Missionary Society*, 78 S.W. 2d 728, err. ref.; *Colonial v. Thedford*, 51 S.W. 263 (no writ); *San Antonio Light v. Moore*, 101 S.W. 867, err. ref., 5 *Texas Law Review* 149 (Page 156); *Lomax v. Marlow et al*, 38 S.W. 228 (no writ); and *Thompson v. McAllen Federated Woman's Building Corp.*, 273 S.W. 2d 105, err. dism.

In the *Thompson* case last cited above, Justice Norvell at Page 107 of the opinion, states as follows:

> "(1) Upon the trial, objection was made to the receiving of much of the testimony above outlined, on the basis of Art. 3716, Vernon's Ann. Tex. Stats., commonly referred to as the Dead Man's Statute. No express ruling on the point was made by the Trial Court, but the objection was carried along with the case. The matter becomes material, however, in considering the sufficiency of the evidence. In our opinion, the testimony was properly received. Although the witnesses may have been officers or agents of the Appellee corporation, it has been settled that the statute has no application to such persons."

Inasmuch as the witness, W. B. Bradley, was not a party to this suit either nominally or formally, the Dead Man's Statute would not apply to his testimony. We submit that the statement made by J. T. Hullum to the witness, Bradley, was clearly admissible as an Admission.

Another complaint of Petitioner is with reference to the admission of certain motion pictures demonstrating to the jury the type of "kicking operation" used in the Tyler Yards. The accident in which the deceased received fatal injuries occurred during a switching operation, commonly known in the railroad industry as a "kicking" operation. This is a highly specialized and technical operation of spotting boxcars efficiently. Since there are other forms of switching operations, it was necessary for the jury to understand the term. It occurs to us that it did no harm for the jury to understand what the witnesses were talking about, and Respondent offered moving pictures demonstrating the type of switching involved. A predicate for this film was first laid by the testimony of witness W. B. Bradley, who was engine foreman in charge of the switching operation both upon the occasion of Mr. Hullman's injury and when the film was made. He testified that the film showed precisely the same type of move which was being made at the time Mr. Hullman was injured. (S.F. 402) As is clearly reflected in the record, the purpose of the film was to demonstrate *only* the type of movement being made at the time of the accident. (S.F. 402) Petitioner's counsel recognized this, (S.F. 424) Witness Bradley testified that as far as practical the movement shown in the film was exactly the same as that made at the time of the accident. (S.F. 441) Respondent produced also witness Jay Oistad, a professional photographer who, at the direction of its counsel, took the moving pictures. The films displayed were properly made and correctly portrayed the objects he had seen with the naked eye. There had been no cutting, erasing or tam-

pering with the film and the same had not been edited prior to bringing it to Court. (S.F. 415-426) Petitioner's counsel objected to the introduction of the film without first having a preview. (S.F. 419) Accordingly, by agreement of all parties, the film was displayed out of the hearing and presence of the jury. (S.F. 421) After having viewed the film, the careful Trial Court permitted only the display of that portion of the film where the photographer had testified there had been no difficulties of any kind, (S.F. 423) holding that Petitioner's objections went to the weight and not to the admissibility of the evidence.

The use of demonstrative evidence has been approved by the Courts (State and Federal) for many years. Motion pictures, as such, likewise have been approved in many cases. The rule in Texas has recently been stated as follows: The determination of the admissibility of demonstration or experimental testimony rests within the discretion of the Trial Judge. Generally, the same is admissible if there is a substantial similarity between the conditions existing at the time of the occurrence which gives rise to the litigation and those in existence at the time the experiment is conducted for demonstration purposes. If the dissimilarity between occurrence conditions and the experimental conditions is minor, or *can be made abundantly clear by explanation*, the same should be admitted. *Ft. Worth & Denver Ry. Co. v. Williams*, Sup. Ct. Texas (1964) 375 S.W. 2d 279. Justice Norvell, in the cited case states at Page 282 as follows:

> "It is not, however, essential that the conditions of the occurrence and the experiment be identical, citing au-

thorities. When there exists a dissimilarity, testimony of an experiment should be excluded when the result thereof would probably confuse rather than aid the jury. There exists an area wherein the determination of the admissibility of proferred experiment testimony rests within the discretion of the trial Judge. This occurs whenever the dissimilarity between the occurrence conditions and the circumstances of the experiment is minor or can be made abundantly clear by explanation."

The Courts have left the determination of admissibility of such demonstrative evidence within the *discretion* of the Trial Judge. As pointed out in *McAllister v. Magnolia Petroleum Co.*, 319 S.W. 2d 411, NRE (1958):

> "Very few tests can be made under the exact conditions present when a prior event occurred. The law requires only that substantially the same conditions must exist. And the Trial Court is allowed *considerable latitude* in determining whether the conditions are sufficiently similar to permit testimony about the tests."

In *Ervay-Canton Apartments v. Hatterick*, 239 S.W. 2d 150, NRE (1951) the Court states: "Allowing real or demonstrative evidence to be introduced in Court rests largely within the discretion of the Trial Court. * * * It is admissible for experiments to be made from such real or demonstrative evidence in the presence of the jury." (Page 152)

The basic principles governing exhibition of still pictures in evidence govern admission of motion pictures, and considerable discretion must be vested in the Trial Court as to accuracy of the picture and as to the relevancy of the picture, particularly as to whether it will tend to aid the jury or to confuse the jury. *Morris v. E. I. DuPont DeNe-*

mours & Co., 139 S.W. 2d 984. (S. Ct. Mo.) The decision of the preliminary question as to whether the conditions are so substantially similar as to authorize the introduction of the evidence is necessarily for the Trial Court, and he has *considerable latitude in deciding it. Pittman v. Baladez*, 158 Tex. 372, 312 S.W. 2d 210 (1958). So, in a case involving a suit against a railroad, the question as to whether to admit a railroad's evidence of a test made on a switch during the course of trial, which test was made nearly one and one-half years after the accident, where the plaintiff claimed the physical situation surrounding the switch was not the same as it was on the day he was hurt, the matter was held to be clearly discretionary with the Trial Court. *LaFrance v. New York, New Haven & Hartford Railroad Co.*, 292 Fed. 2d 649 (1961).

As stated in *Ft. Worth & Denver Ry. Co. v. Williams*, supra, it is not essential that the conditions of the occurrence and the experiment be identical. This has been the rule in Texas at least as early as 1921, when, in the case of *Panhandle & S.F. Ry. Co. v. Haywood*, 227 S.W. 2d 347, er. ref. experimental evidence was offered as to how far a child could be seen by the train crew of an approaching engine. Tests were made under conditions similar to those existing at the time of injury, but there were important differences. The Court held that exact similarity of conditions is not absolutely essential to sustain the introduction of evidence as to the result of experiments, but that there need be only a substantial similarity and that dissimilarity *affects* the

weight rather than the *admissibility* of the evidence. The Court, in the Panhandle case, states as follows:

> "The decision of the preliminary question as to whether the conditions are so substantially similar as to authorize the introduction of the evidence *is necessarily for the Trial Court and he has considerable latitude of discretion in deciding it.*"

The Court, in *Houston E. & W. T. Ry. Co. v. Sherman*, 42 S.W. 2d 241 (Com. App.) held that it was permissible to prove the existence or non-existence of a fact by experiments made for that purpose under circumstances substantially the same as those existing at the time of the occurrence or non-occurrence of the alleged fact. In the cited case one witness was permitted to testify to an experiment made by him about six months after the accident, which experiment was designed to ascertain how far a train approaching a crossing where the accident occurred could be seen. There was testimony that when these experiments were made the conditions surrounding the scene were substantially the same except that the weeds, grass and bushes on the right-of-way of the crossing had been cleared away. The Court held that, with explanation, it was not error for the Trial Court to permit plaintiff to make proof of the observation experiments.

See also *Standard Motor Co. v. Blood*, 380 S.W. 2d 651 (Tex. Civ. App., no writ).

An interesting case appears in *Richardson v. M. K. & T. Ry. Co. of Texas*, 205 S.W. 2d 819, err. dism. (1947). The suit was made by S. A. Richardson against the defendant carrier under the Federal Employers Liability Act to re-

cover for injuries sustained by him while he was operating a machine in a planing mill of the defendant's machine shops. The plaintiff appealed from an adverse judgment. One of his complaints related to the Trial Court's admitting into evidence a technicolor motion picture showing the operation of the machine which allegedly caused the plaintiff's injury. One of his objections was that a proper predicate had not been laid for the showing of the motion pictures because they were not made under the same or similar circumstances as those existing when the accident occurred. The Court upheld the Trial Court in admitting the motion pictures, stating in part at Page 824 as follows:

> "All the authorities recognize the law to be that when a photograph or motion picture is sufficiently verified and is a proper representation of an important fact in issue and that it is instructive on preliminary questions to be determined by the tryer of the facts, the admission or rejection of the picture is a matter which rests largely in the discretion of the trial judge, and that his decision in the matter will not be disturbed by the Appellate Courts unless he has arbitrarily exercised such wide discretion. The question is not whether he acted wisely in allowing the picture to become part of the evidence, but the question for us to decide is, did he abuse his discretion by doing so?"

The Court held that the objections (being that the same does not show the exact conditions at the time of the accident) went to *weight* rather than to *admissibility*. See also *Blake v. Harding*, 54 Utah 158, 180 Pac. 172.

It is clear that under the decisions, Petitioner's objections go to the weight of the evidence and not to its admissibility. As stated in *Panhandle & S.F. Ry. Co. v. Haywood*,

supra, "It seems to be the rule that an exact similarity in conditions is not absolutely essential to sustain the introduction of evidence as to the result of experiments; only a substantial similarity is required, and this similarity affects the *weight* rather than the *admissibility* of the evidence."

Similar holdings were made in *Ft. Worth & Denver Ry. Co. v. Yantis,* 185 S.W. 969, err. ref.; and *Richardson v. M. K. & T. Ry. Co. of Texas,* supra.

Thus, it has been held in many cases that experimental or demonstrative evidence is admissible where only a substantial similarity is shown and where the Court has held that the points of dissimilarity have been satisfactorily explained. The admissibility is left to the sound discretion of the Trial Court. Examples of such evidence held admissible were as follows:

Evidence of an experiment in giving cattle water with sodium bicarbonate to prove that the drinking of the same resulted in a falling off in milk production, *Lone Star Gas Co. v. Thomas,* 345 S.W. 2d 844 NRE:

Experimental testimony relating to the slippery effect certain substances had upon a ladder upon which plaintiff was injured, it appearing that the demonstrative evidence conditions were quite dissimilar from the conditions at the time plaintiff was injured, *McAllister v. Magnolia Petroleum Company,* 319 S.W. 2d 411, NRE;

Experimental testimony regarding a witness' timing that it took a street car to reach one point from another, held

admissible, although conditions greatly dissimilar, *Dallas Railway & Terminal Co. v. Darden*, Com. App., 38 S.W. 2d 777 (1931);

Experimental testimony demonstrating the manner in which a banana peel would smear a rubber mat in a coach where plaintiff had slipped and fallen, held admissible although many of the conditions were dissimilar, *Ft. Worth & Denver Ry. Co. v. Yantis*, supra;

Demonstrative evidence tending to show how far a man could be seen on the track south of the road crossing by persons standing on the crossing, held admissible, *Houston & T. C. Ry. Co. v. Ramsey*, 97 S.W. 1067, err. ref.;

Demonstrative evidence in the form of colored motion pictures demonstrating how defendant's machine was operated, held admissible, *Morris v. E. I. DuPont DeNemours & Co.*, (Sup. Ct. Mo.) 139 S.W. 2d 984. See also 85 A.L.R. 480.

As stated in McCormick & Ray, Vol. 2, *Texas Law of Evidence*, at Page 322, "As the novelty of the use of motion pictures in Court has worn off, the Courts have shown greater liberality in receiving the films where they hold promise of assisting the tryers in resolving any issue." Of course, there are a multitude of cases admitting motion pictures showing activities of claimants in workmen's compensation cases.

It is not controverted by Petitioner that the movies in question were offered merely to demonstrate the *type* of

switching operation in which the crew was involved at the time of the accident. (S.F. 402) The qualifying witness Bradley stated that the operation was "substantially the same as being made at the time of the accident." He testified that, "As far as practical it was precisely the same movement." (S.F. 441) This switching operation was performed not only at the same location, but also the same tracks were being used and the "kicking" movement was made upon the very track where the deceased received his injury. The speed of the cut of cars was precisely the same as had been testified to by numerous witnesses. Moreover, the points of dissimilarity were explained in detail by the witness. There was no occasion for the jury to be misled in any way. Those explanations, taken in conjunction with the purpose for which the demonstration was made, enlightened the jury as to what was meant by a "kicking" movement. It enabled the jury to get a first hand impression of the actual type operation in use at the time decedent received his injury. There was neither an attempt nor a claim made here that Mr. Hullum's accident was being re-enacted. We were demonstrating a "kicking operation" only at the locale where Mr. Hullum received his injury — nothing more. (S.F. 419) Moreover, prior to displaying the movies, Respondent proved beyond contravention, by an experienced photographer, that the pictures were correctly taken with good equipment and good film, that having developed the film, the same correctly portrayed the objects seen by the photographer with his naked eye. Those portions of the film which were defective

because the camera had run down before the switching operation was completed, were *not* shown to the jury and the careful Trial Judge below excluded them. The films clarified for the jury what witness Bradley explained to them and demonstrated before them upon cross-examination by Petitioner's counsel. (S.F. 431-442) The jury, having seen the film, at least had a clearer picture and idea as to what all the witnesses were talking about in the matter of "kicking", "humping", "stretching and bunching the slack", "pulling of the pins", "releasing of tension on the draw bars", and similar technical terms used by these witnesses in this case. Efforts to enlighten the jury so that it may better understand the evidence presented should not be condemned. The use of demonstrative evidence is usually recommended and approved. As stated above, any points of dissimilarity such as temperature, number of cars, different engineers, and different crewmen, were adequately explained prior to the display of the movies. It is inconceivable to us how the jury, in view of all that, could have been misled in any manner. We do not see how the displaying of this demonstrative evidence could have harmed the Petitioner in any way. *Houston & T. C. Ry. Co. v. Ramsey*, supra.

The evidence was clearly admissible under State Law and under Rule 43, Federal Rules of Civil Procedure. The Federal Rule favors the reception of the evidence. It is difficult to see how the admission of this competent evidence denied Petitioner a federally created right.

VII. No federally created right was denied Petitioner because there has been no improper judicial review by the Appellate courts below.

The Petitioner asks this Honorable Court to apply the State standard of the sufficiency of the evidence instead of the Federal standard which has been so carefully established in such cases as *Rogers v. Missouri Pacific Railroad Co.*, supra. In addition to a "no evidence" power of review over the jury's verdict, the State courts of Texas have the power to reverse and to remand a case, even when there is sufficient evidence to require submission to the jury, whenever, in the opinion of the Court of Civil Appeals, the verdict is "against the great weight and overwhelming preponderance of the evidence." Chief Justice Robert Calvert, " 'No Evidence' and 'Insufficient Evidence' Points of Error," 38 Tex. L. Rev. 361; e.g. *In Re King's Estate*, 150 Tex. 662, 244 S.W. 2d 660. This power exists because the Texas Constitution, unlike the Seventh Amendment to the United States Constitution, provides that the Court of Civil Appeals, not the jury, has the final power to decide all fact questions. Tex. Const. Art. 5 Section 6. An unsuccessful effort has already been made to apply the Texas standard to F.E.L.A. cases. In the case culminating in *Deen v. Hickman*, 358 U.S. 57, this Court made it clear that the federal standard, not the Texas standard, applied in F.E.L.A. cases. Nevertheless, Petitioner invites this Court to use the state standard as a device to supplant the jury's function in F.E.L.A. cases tried in Texas courts.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should not be granted.

Respectfully submitted,

Jack W. Flock

JACK W. FLOCK,
Member of the Bar of the Supreme Court of the United States,
Attorney for Respondent.

Of Counsel:
CLYDE W. FIDDES,
GALLOWAY CALHOUN, JR.,
RAMEY, BRELSFORD,
FLOCK & DEVEREUX,
Citizens First National Bank Bldg.,
P. O. Box 629,
Tyler, Texas 75702.

CERTIFICATE OF SERVICE

This is to certify that on the 18 day of October, 1965, a true and correct copy of the Brief in Opposition was served upon the following parties at their last known addresses:

McLENDON & TYLER, Tyler, Texas,

SCHMIDT & GARRETT, 1307 Sterling Building Houston, Texas 77002,

MABEL GREY HOWELL, 702 Sterling Building Houston, Texas 77002, Attorneys for Petitioner

by placing same in the United States Mail, properly addressed, postage prepaid, CERTIFIED MAIL.

Jack W. Flock

JACK W. FLOCK

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IN THE

Supreme Court of the United States

October Term 1965

No. 488

MRS. ADELLE HULLUM, ADMINISTRATRIX,
Petitioner

v.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY,
Respondent

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Of Counsel:
GEORGE L. SCHMIDT
4714 Fannin Street
Houston, Texas

MAX GARRETT
4714 Fannin Street
Houston, Texas
Attorney for Petitioner

Alpha Law Brief Co., M & M Bldg., Houston, Texas 77002

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner, Mrs. Adelle Hullum, Administratrix, respectfully calls to the attention of the Court that she and other railroad employee litigants in Texas Courts have been and are continuing to be deprived of their federally created rights under the Federal Employers Liability Act, (Title 45 U.S.C., Section 51 et seq. as amended) by local practice and procedure in the Texas Courts.

Petitioner respectfully urges reconsideration by this Honorable Court of her Petition for Writ of Certiorari, which was denied by an order entered November 8, 1965, and particularly the first three questions presented, as follows:

QUESTIONS PRESENTED

I. To accord Petitioner a fair trial, did the lower courts deprive Petitioner of her federally created rights under the FELA by local practice and procedure by the holding of the Court of Civil Appeals, the trial Court properly refused to submit to the Jury Petitioner's Requested Issues No. 1-A and 2-A, inquiring as to the negligence and proximate cause as to the "kicking of cars on the occasion in question on a downgrade"?

II. To accord Petitioner a fair trial, did the lower courts deprive Petitioner of her federally created rights under the FELA by local practice and procedure by the Court of Civil Appeals holding the trial court properly refused to submit to the Jury Petitioner's Requested Special Issues Nos. 3-A, 4-A and 5-A inquiring as to the fact of, Respondent's negligence and proximate cause as to the defendant's crew kicking cars in question "without first determining that J. T. Hullum was in a safe position aboard the car he was riding"?

III. To accord Petitioner a fair trial did the lower courts deprive Petitioner of her federally created rights under the FELA by local practice and procedure by the Court of Civil Appeals holding the trial court properly refused to submit to the Jury Petitioner's Specially Requested Instruction No. 2 reading:

"You are further instructed that the Defendant Railroad is under a continuing non-delegable duty to provide its employees, including the Plaintiff's decedent, J. T. Hullum, with a reasonably safe place within which to work."

Petitioner alleged that the Respondent's negligence included the kicking the cars in question on a downgrade and in kicking the cars in question without *first determining* that the decedent was in a safe position aboard the car he was riding, which in whole or in part proximately caused his injuries and death.

The proof showed that there was no necessity for kicking the cars on a downgrade, and that the engine foreman who gave the signal for kicking the cars did not first determine that the Petitioner's decedent was in a safe position aboard the cars, although it was his duty to know such fact before kicking the cars.

The Petitioner's suit, being filed in the District Court of Smith County, Texas, was submitted to the jury upon Special Issues, a practice peculiar to Texas. Special Issues were requested by Petitioner to be submitted to the jury inquiring as to negligence alleged and proved in kicking the cars on a downgrade and without first determining that the decedent was in a safe place aboard the car he was riding. These requested Special Issues were erroneously refused by the Trial Court, and the jury was not permitted to pass on such negligence.[1]

---

[1] The opinion of the Texas Court of Civil Appeals is in direct conflict with this Court's holdings in **Rogers v. Missouri Pacific Railroad Company**, 77 S.Ct. 433, 352 U.S. 500, to the effect that "the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject

Petitioner's suit was based upon the Federal Employers Liability Act which has been held to impose upon the railroad employer the continuing non-delegable duty to provide the employee with a safe place in which to work, and which duty extends to the acts and conduct of the employer and its other employees. The proof showed that the engine foreman repeatedly contended that the determination of the manner in which the work was to be done was left to his discretion. Petitioner requested the Trial Court to give an instruction to the jury "that the Defendant Railroad is under a continuing non-delegable duty to provide its employees, including the Plaintiff's decedent, J. T. Hullum, with a reasonably safe place within which to work." The trial Court erroneously refused to give such instruction.[2]

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of the suit". This conflict will continue to plague litigants under this Act unless corrected, because even though it is not so, many trial courts consider the refusal of Writ of Certiorari of this Court as an approval of the lower court's decision, reasoning and result notwithstanding.

[2] The opinion of the Texas Court of Civil Appeals is in direct conflict also with this Court's holdings in **O'Donnell v. Elgin J. & E.**, 70 S.Ct. 200; 338 U.S. 384, and **Affolder v. New York C & St. L. R. Co.**, 70 S.Ct. 509; 339 U.S. 96, to the effect that "the plaintiff was entitled to a peremptory instruction" as to the railroad's liability for and what constituted a violation of the Safety Appliance Act without consideration of negligence or diligence. Also it is in conflict with the opinion in **Denny v. Montour R. Co.**, 101 F. Supp. 735 holding in effect that the Court was required to charge the jury that "a duty rested on the Defendant to provide the Plaintiff employee a safe place in which to work, and reasonably safe tool with which to work" in order that the doctrine of negligence could be applied to the facts. This conflict will continue and further frustrate litigant's rights under the Act in view of the popular misconception that a notation of certiorari denied means approval of the reasoning and result of the lower courts decisions.

The jury found that the occurrence in question was the result of an unavoidable accident, in answer to a Special Issue inquiring as to that conclusion. Objections to such special issue being submitted were likewise erroneously overruled.[3] Judgment was entered against Petitioner. Her appeals to the Texas Appellate Courts were denied.

The Texas Court of Civil Appeals has by its holding erroneously applied the law as determined by the federal Courts in these F.E.L.A. cases. It has applied a strict formula that denies the litigant the right to have a jury determine whether the employer's negligence played a part in his injury, by permitting the jury to pass upon only select special issues the Texas Courts feel covers the negligence. The jury is not permitted to find negligence generally upon the issues raised and supported by evidence. The jury is confined to a prior determination by the Texas Courts of what negligence they can consider. The Texas Courts do not even leave to the jury the determina-

[3] The submission to the jury by the Trial Court of the special issue inquiring as to "unavoidable accident" is in direct conflict with the holding in **Page v. St. Louis Southwestern Railway Company**, 312 F.2d 84, 93 and 349 F.2d 820 (decided August 10, 1965, rehearing denied September 22, 1965, published October 11, 1965) wherein Judge Rives and Brown in separate opinions concluded that an instruction on "unavoidable accident" is confusing and tends to distract the jury's attention from the single issues whether the carrier was negligent, causing in whole or in part the plaintiff's injury, and that in a charge properly structured, there is no need or place for such instruction. The continued resistance of the Texas state courts to the Federal Courts' interpretation of the Act even afflicts the lower Federal Courts. This type of restrictive practice should come to an end, and the liberal construction and application originally intended should prevail everywhere, even in Texas. This Honorable Court is the only source of correction.

tion of what conduct would constitute negligence. The jury can only pass on what conduct the Texas Courts dtermine to be negligence. They further cannot be advised of the effect of their answers to the Special Issues.

Which brings us to the refusal of the trial court to instruct the jury as to the continuing non-delegable duty owed by a railroad to its employees. Under Texas practice and procedure the jury is not permitted to know the rights and duties of the litigants. They therefore are not in any position to *know* what is negligence and what is not.

Thus the Texas Courts have by local practice and procedure deprived the Petitioner of her federally created rights under the Federal Employer's Liability Act as construed by the Federal Courts. This type of error is of such grave importance that Petitioner is compelled to speak out, not only for herself and children, but for all other litigants so improperly burdened in their litigation.

There were other errors raised and presented in the Petition for Writ of Certiorari, each of which should require reversal, but these first three are so important that it is felt this Honorable Court would be concerned if brought to its attention.

CONCLUSION

There are presented to this Honorable Court these questions of grave national concern involving the rights of litigants being frustrated by local practice and procedure. These errors should receive the attention of the Court, so that litigants will not be deprived of their federally created rights.

The errors raised are such that Petitioner feels a Rehearing of this Court's order denying her Petition for Writ of Certiorari be granted, and that this Court's Writ of Certiorari issue and that the judgment of the trial court and the Court of Civil Appeals for the 12th Supreme Judicial District of Texas be reversed and remanded for a new trial.

Respectfully submitted,

MAX GARRETT
4714 Fannin Street
Houston, Texas
Attorney for Petitioner

Of Counsel:

GEORGE L. SCHMIDT
4714 Fannin Street
Houston, Texas

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

CERTIFICATE OF SERVICE

THE STATE OF TEXAS §
§
COUNTY OF HARRIS §

I, Max Garrett, one of the attorneys of record for the Petitioner, Mrs. Adelle Hullum, and a member of the Bar of the Supreme Court of the United States, depose and say that on the 17th day of November, 1965, I served triplicate copies of the foregoing Motion for Rehearing in the Supreme Court of the United States on Jack W. Flock, Esq. and Messrs Ramey, Brelsford, Flock & Devreaux and Clyde W. Fiddes, Esq. and Messrs. Calhoun & Clark at their present address; Citizens First National Bank Building, Tyler, Texas, by depositing same in a United States Post Office in the City of Houston, Texas, with first class postage prepaid, via Certified Mail. Tyler, Texas, is less than 500 miles from Houston, Texas.

Max Garrett

SUBSCRIBED AND SWORN TO before the undersigned authority on this the 17th day of November, 1965.

Tommy R. Letbetter

Notary Public in and for Harris County, Texas